IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5937

RECEIVED
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SUPREME COURT, U.S.

VENTURA YBARRA, Appellant

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Appellee

ON APPEAL FROM THE ILLINOIS APPELLATE COURT,
SECOND JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT

Ralph Ruebner, Deputy Defender
OFFICE OF THE STATE APPELLATE DEFENDER
130 North Wells, Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Appellant

Ian D. Goldberg
Assistant Defender

Of Counsel

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CITATIONS

CASES

Bantam Books v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963);

City of Tacoma v. Mundell, 495 P. 2d 682 (Wash. Ct. App., 1972);

Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971);

Commonwealth v. Platou, 312 A. 2d 29 (Pa. Sup. Ct., 1973);

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921);

Interstate Circuit v. Dallas, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968);

McAllister v. State, 306 N.E. 2d 395 (Ind. Ct. App., 1974);

People v. Costales, 354 N.E. 2d 849 (N.Y. Ct. App., 1976);

People v. Dukes, 48 Ill. App. 3d 237, 363 N.E. 2d 62 (Ill. App. Ct., 1977);

People v. Lujan, 484 P. 2d 1238 (Colo. Sup. Ct., 1971);

People v. Smith, 234 N.E. 2d 460 (N.Y. Ct. App., 1967);

Sibiski v. State, 310 A. 2d 200 (Md. Ct. Spec. App., 1973);

Smith v. State, 289 So. 2d 816 (Ala. Sup. Ct., 1974);

Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965);

State v. Bradbury, 243 A. 2d 302 (N.H. Sup. Ct., 1968);

State v. Burns, 306 A. 2d 8 (Me. Sup. Ct., 1973);

State v. Carufel, 263 A. 2d 686 (R.I. Sup. Ct., 1972);

State v. Fox, 168 N.W. 2d 260 (Minn. Sup. Ct., 1969);

State v. Mendez, 565 P. 2d 873 (Ariz. Sup. Ct., 1977);

State v. Nabarro, 525 P. 2d 573 (Hawaii Sup. Ct., 1974);

State v. Sims, 382 A. 2d 638 (N.J. Sup. Ct., 1978);

State v. Smith, 227 S.E. 2d 911 (Ga. Ct. App., 1976);

State v. Wise, 284 A. 2d 292 (Del. Sup. Ct., 1971);

U.S. v. Branch, 545 F. 2d 177 (D.C. Cir., 1976);

United States v. DiRe, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948);

U.S. v. Festa, 192 F. Supp. 160 (D.C. Mass., 1960);

U.S. v. Haywood, 284 F. Supp. 245 (D.C. La, 1968);

Willis v. State, 177 S.E. 2d 487 (Ga. Ct. App., 1970).

LAW REVIEW ARTICLE

W. LaFave, Search and Seizure: The Course of True Law... Has Not...Run Smooth, 1966 Ill. Law Forum 266.

STATUTES

Ill. Rev. Stat., 1975, Ch. 38, Sec. 108-9.

Ga. Code Ann., §27-309;

Ariz. Rev. Stat., §13-1446(E);

Kansas St. Ann., §22-2509;

D.C. Code, 1973, §23-524(g).

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NO. _____

VENTURA YBARRA, Appellant

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Appellee

ON APPEAL FROM THE ILLINOIS APPELLATE COURT,
SECOND JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT

Introduction

Ventura Ybarra appeals from the judgment of the Illinois Appellate Court, Second Judicial District, affirming his conviction for possession of heroin and upholding an Illinois statute against the claim that its application to the facts of the case violated the Fourth Amendment of the United States Constitution. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Illinois Appellate Court, Second Judicial District, is reported at 58 Ill.App.3d 57, 373 N.E.2d 1013 (1978). A copy of the opinion is attached hereto as Appendix A. Copies of the orders of the Appellate Court denying rehearing and denying a certificate of importance may be found in Appendix B. A copy of the order of the Illinois Supreme Court denying leave to appeal may be found in Appendix C.

Jurisdiction

The decision of the Illinois Appellate Court in this case, affirming appellant's conviction for possession of heroin, was issued on February 9, 1978. (See Appendix A) Rehearing was sought, but was denied on April 7, 1978. (See Appendix B) The Appellate Court was also asked to certify the importance of this question to the Illinois Supreme Court, but this was denied on April 10, 1978. (See Appendix B) A petition for leave to appeal was filed, but was denied by the Illinois Supreme Court on September 28, 1978. (See Appendix C) Notice of Appeal to the United States Supreme Court was filed on December 1, 1978 in the Illinois Appellate Court for the Second Judicial District. (See Appendix D)

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). Cases sustaining the jurisdiction of this Court to review the judgment herein are: Cohen v. California, 403 U.S. 15, 17-18, 91 S.Ct. 1780, 29 L.Ed.2d 284, 289 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n.3, 83 S.Ct. 631, 9 L.Ed.2d 584, 588 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921); Interstate Circuit v. Dallas, 390 U.S. 676, 678, n.1, 88 S.Ct. 1298, 20 L.Ed.2d 225, 228 (1968).

Statute Involved

Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9:

> Detention and Search of Persons on Premises. In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack,
>
> or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

Question Presented

CAN ILLINOIS BY STATUTE GIVE POLICE OFFICERS THE AUTHORITY TO SEARCH ALL OF THE PATRONS OF A PUBLIC ESTABLISHMENT INCIDENT TO THE EXECUTION OF A SEARCH WARRANT FOR THE PREMISES, WHERE THE OFFICERS DID NOT SUSPECT THE PATRONS OF HAVING COMMITTED ANY OFFENSE, OF HAVING ANY CONNECTION TO THE CONTRABAND THEY WERE SEEKING, OR OF POSING A THREAT TO THEIR SAFETY?

Statement of the Case

Ventura Ybarra was charged by a Kane County, Illinois grand jury with unlawful possession of heroin. (C. 16)* The defense filed a pre-trial motion to suppress the heroin that had been seized from Ybarra during a search of himself and approximately twelve other lawful patrons of a public tavern known as the "Aurora Tap". (C. 22-23). The basis of the motion was that the officers who conducted the search had no probable cause to search Ventura Ybarra, and had no warrant respecting him. (C. 22-23). At the hearing on this motion, Officer Jerome Johnson testified as follows:

On March 1, 1976, while working as an investigator for the Illinois Bureau of Investigation, Johnson participated in the execution of a search warrant at the Aurora Tap. (R. 20-21). Approximately eight other officers took part in the execution of the warrant. (R. 21). The search warrant authorized the search of the Aurora Tap Tavern, and a bartender within it by the name of Greg, for evidence of the offense of possession of a controlled substance. (R. 24).

Agent Johnson stated that nine to thirteen patrons were in the tavern when he arrived there, and that he was not looking for anyone in particular. (R. 25, 61). Johnson had not seen any of the patrons before. (R. 25). On entering the tavern, the agents announced their purpose and advised everyone to

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* "C" designates the common law record on appeal. "R" designates the transcribed report of proceedings.

stay where they were, and that they were going to make a "cursory search for weapons." (R. 31). The lighting was sufficient in the tavern for him to observe the customers. (R. 25). Johnson stated that when the officers entered, Ventura Ybarra was standing by a pinball machine, dressed in a red and black jacket. (R. 26). He noticed nothing protruding from Ybarra's clothing, and there was no indication that he had a weapon or was hostile. (R. 26-27, 77). Ybarra was standing in the general vicinity of all the other patrons. (R. 26).

At this point, Agent Johnson ordered every patron of the Aurora Tap to stand and be searched. (R. 27). He then searched every customer, including Ventura Ybarra. (R. 33). At the time that Ybarra was searched, Agent Johnson had no knowledge or indication that he or any of the other customers had committed any offense. (R. 27) Ventura Ybarra did not make any threatening moves toward anyone, nor any gesture indicative of criminal conduct. (R. 28, 29). Agent Johnson then subjected Ybarra to a "pat down, cursory search for weapons for our protection". (R. 33). Upon questioning by defense counsel, he stated that he found nothing, but on being cross examined by the State's Attorney, he stated he felt a cigarette pack with objects in it. (R. 28, 34). After then searching everyone else in the tavern, he returned and searched Ybarra a second time. (R. 34). Agent Johnson still had no indication that Ybarra had a weapon prior to this second search, and Ybarra's hands, which were empty, were visible to him. (R. 30). Johnson also had no indication prior to this second search that Ybarra had committed an offense, or that he had any contraband on his person. (R. 79-80). Agent Johnson testified that he removed six tin foil packets of heroin from Ybarra's pocket during this second search. (R. 30, 65-6). He also stated that there was one entrance and one exit in the tavern and that the tavern was a fairly large room. (R. 32, 81). During the search, patrons were prevented from entering or leaving. (R. 81).

During argument on this motion, the State relied on Chapter 38, Section 108-9 of the Illinois Revised Statutes, which is set out in the "Statutes Involved" section of this jurisdictional statement. (R. 43). The defense attorney argued that this statute was of dubious constitutionality because of the case of United States v. DiRe, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948).

The court denied the motion to suppress and made the following finding of fact:

> I would make the finding of fact that the search for weapons was conducted and that search was under Section (b) [of Sec. 108-9]: To prevent the disposal or concealment of any instrument, article or things described in the Search Warrant. (R. 52-53).

The cause proceeded to a bench trial and the Court found the defendant guilty of possession of heroin. (R. 96). Ybarra was then sentenced to two years probation. (C. 42, 78, 81, R. 101, 104).

An appeal was taken to the Appellate Court of Illinois, Second Judicial District. The only issue on appeal was whether the search was violative of the Fourth Amendment and whether Section 108-9, if construed so as to permit searches of this type, was unconstitutional. The Court summarized its holding as follows:

> "In summation, we do not find section 108-9 of the Illinois Code of Criminal Procedure to be unconstitutional in its application to the facts before us. We therefore affirm the judgment of the conviction of the defendant herein." (Appendix A, p. 5-6).

The Court also stated that "in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs". (Appendix A, p. 3). However, no such allegation is contained in the complaint for search warrant, which is set out in full in Appendix E.

Following the denial of a petition for rehearing and for certificate of importance by the Appellate Court, appellant

filed a Petition for Leave to Appeal in the Illinois Supreme Court raising the same question decided by the Appellate Court. This petition was denied.

The Question Is Substantial

Introduction

The Illinois Appellate Court held in this case that where police officers had a search warrant for a tavern and a bartender, they could search each patron of that tavern, even though the police did not suspect that any of the patrons were connected to the contraband they were seeking or posed a danger to the officers. This holding was based on the Court's construction of an Illinois statute concerning the execution of search warrants. As construed in this opinion, the statute is in direct conflict with the Fourth Amendment to the United States Constitution. On the authority of this case, Illinois police officers may now engage in searches of persons whom they have no reason to suspect of crime, merely because they patronize a public place for which the police have a search warrant. This question is substantial not only because it jeopardizes the federal constitutional rights of every citizen of Illinois, but also because the statute involved here has counterparts in several other jurisdictions, and constitutional issues concerning such statutes will likely continue to arise.

The Case Is Within The Court's Jurisdiction Under 28 U.S.C. §1257(2).

This case is properly before this Court because the validity of a State statute was drawn into question below "on the ground of its being repugnant to the Constitution ... of the United States, and the decision [was] in favor of its validity". 28 U.S.C. §1257(2). It has repeatedly been held that where a claim is made that a statute is unconstitutional as applied to the facts of a case, and where that claim is rejected by the highest state court in which review could be

had, this Court's jurisdiction under 28 U.S.C. 1257(2) may be invoked. Cohen v. California, 403 U.S. 15, 17-18, 91 S. Ct. 1780, 29 L. Ed. 2d 284, 289 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n.3, 83 S. Ct. 631, 9 L.Ed. 2d 584, 588 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921). This was the claim in this case, and it was rejected by the Illinois Appellate Court. The Appellate Court, by virtue of the Illinois Supreme Court's refusal to exercise its discretionary jurisdiction, was the highest State court in which review could be had. Interstate Circuit v. Dallas, 390 U.S. 676, 678, n.1, 88 S. Ct. 1298, 20 L. Ed. 2d 225, 228 (1968).

The Construction Given Ill. Rev. Stat., 1975, Ch. 38, Sec. 108-9 By The Illinois Appellate Court Transforms Every Illinois Search Warrant Into An Illegal General Warrant, And Authorizes Searches That Violate Fourth Amendment Rights.

Ever since the government conceded, in the widely cited case of United States v. DiRe, that a search warrant for premises could not justify a search of all persons within it, this concept has been accepted virtually without question. United States v. DiRe, 332 U.S. 581, 587, 68 S. Ct. 222, 225, 92 L. Ed. 210, 216 (1948); and see authorities cited in footnote below.* Another rule, equally well accepted,

*U.S v. Branch, 545 F. 2d 177, 181 (D.C. Cir., 1976);
U.S. v. Festa, 192 F. Supp. 160, 163 (D.C. Mass., 1960);
U.S. v. Haywood, 284 F. Supp. 245 (D.C. La., 1968);
City of Tacoma v. Mundell, 495 P. 2d 682, 684 (Wash. Ct. App., 1972);
State v. Burns, 306 A. 2d 8, 10 (Me. Sup. Ct., 1973);
Sibiski v. State, 310 A. 2d 200, 201 (Md. Ct. Spec. App., 1973);
Smith v. State, 289 So. 2d 816 (Ala. Sup. Ct., 1974);
Commonwealth v. Platou, 312 A. 2d 29 (Pa. Sup. Ct., 1973);
Willis v. State, 177 S.E. 2d 487, 490 (Ga. Ct. App., 1970);
State v. Bradbury, 243 A. 2d 302 (N.H. Sup. Ct., 1968);
People v. Smith, 234 N.E. 2d 460 (N.Y. Ct. App., 1967);
People v. Costales, 354 N.E. 2d 849 (N.Y. Ct. App., 1976);
State v. Fox, 168 N.W. 2d 260 (Minn. Sup. Ct., 1969);
State v. Nabarro, 525 P. 2d 573 (Hawaii Sup. Ct., 1974);
State v. Carufel, 263 A. 2d 686, 691 (R.I. Sup. Ct., 1972);
People v. Lujan, 484 P. 2d 1238 (Colo. Sup. Ct., 1971);
State v. Wise, 284 A. 2d 292 (Del. Super. Ct., 1971);
McAllister v. State, 306 N.E. 2d 395, 397 (Ind. Ct. App., 1974);
State v. Sims, 382 A. 2d 638 (N.J. Sup. Ct., 1978).

is that mere presence at the scene of suspected criminal activity, without more, does not give rise to probable cause to search. Sibron v. New York, 392 U.S. 40, 62, 88 S. Ct. 1889, 20 L. Ed. 2d 917, 934 (1968). The conduct of the police in this case violated both of these rules, and the State statute which the Appellate Court construed as permitting this conduct is unconstitutional as applied to these facts.

The contested statute reads as follows:

> Detention And Search Of Persons On Premises.
>
> In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack, or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.
>
> Ill. Rev. Stat., 1975, Ch. 38, Sec. 108-9.

The Appellate Court found that the search of the customers in this case was justified under Section (b) of the above statute. Yet Officer Jerome Johnson, who searched Ventura Ybarra, testified that he had no indication that Ybarra or any of the other patrons had committed any offense. (R.27) At no time in this case, at trial or on appeal, has the State contended that the searching officers suspected the patrons of any criminal activity or of concealing contraband, and Officer Johnson's testimony showed that he entertained no such suspicion. The only possible justification for the search was, therefore, defendant's mere presence in the bar. DiRe and the other cases cited above clearly demonstrate the illegality of such a search.

Officer Johnson's description of the procedure at the bar was that he first conducted a "pat down, cursory search for weapons for our protection". (R.33) According to Johnson, he later returned to search Ybarra a second time, at which time he discovered the heroin. (R.34) The initial

pat down was itself not permissible, for Johnson testified that he had no indication that Ybarra had a gun or was hostile prior to the pat down. (R.26-29, 77) Moreover, once Johnson's pat down disclosed no weapon or contraband, the second search which revealed the heroin was impermissible, for Johnson himself admitted that he had no indication prior to the second search that Ybarra had a weapon or contraband. (R.30, 79-80)

Despite the unequivocal nature of Officer Johnson's testimony, the Appellate Court found that the search of Ybarra was permissible.* The Appellate Court held that the statute permitted the search of those present where a search warrant was being executed, even though the persons searched were not suspected of possessing contraband or of posing a danger to those conducting the search. This construction of the statute brings it into direct conflict with the rule that a search warrant does not confer on the police the right to search all parties present on the premises named in the warrant. Also at odds with this construction is the fundamental Fourth Amendment proposition that a search warrant must particularly describe the objects of the search. Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). This proscription against "general warrants" is violated where a search warrant gives the police the power to search unspecified persons. State v. Sims, 382 A. 2d 638 (N.J. Sup. Ct., 1978); McAllister v. State, 306 N.E. 2d 395, 397 (Ind. Ct. App., 1974); State v. Wise, 284 A. 2d 292 (Del. Super. Ct., 1971); People v. Nabarro, 525 P. 2d 573 (Hawaii Sup. Ct., 1974); Commonwealth v. Platou, 312 A. 2d 29 (Pa. Sup. Ct., 1973). The violation is certainly more severe where the State seeks by statute to automatically include such a power in every search warrant. The State of Illinois, by passing the instant statute, has attempted to turn every warrant into a general warrant, and the Appellate Court's construction of that statute accomplishes just this end.

One noted commentator has questioned the constitutionality of Section 108-9, noting that a narrow reading may have to be given to it for it to be upheld. W. LaFave, Search and Seizure: The Course of True Law...Has Not...Run Smooth, 1966 Ill. Law Forum 266, 272. Professor LaFave suggests that United States v. DiRe, supra will permit a search of a person present when a search warrant is being executed only where some additional connection of that person to the premises exists, beyond the mere status of guest. 1966 Ill. Law Forum, at 272. See also People v. Dukes, 48 Ill. App. 3d 237, 363 N.E. 2d 62 (Ill. App. Ct., 1977). The application of the statute to the present case goes far beyond Professor LaFave's proposed reading.

At least four other jurisdictions, Georgia, Arizona, Kansas, and the District of Columbia, have statutes similar to Section 108-9.* No case in these jurisdictions has upheld searches where, as here, the police specifically testified that they had no suspicions regarding the party searched. (See cases cited in opinion of Appellate Court.) Police conduct far less outrageous than that permitted here has been struck down by the Courts of several of these states as not consonant with a constitutional reading of the statutes. See, e.g., State v. Smith, 227 S.E. 2d 911 (Ga. Ct. App., 1976); State v. Mendez, 565 P. 2d 873 (Ariz. Sup. Ct., 1977). This conflict in interpretation is another reason why this case merits the Court's consideration.

*In addition to overlooking the significance of the testimony of Officer Jerome Johnson that he did not suspect the patrons of concealing contraband, the Court relied on another fact that simply is not true: the Court stated that "in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs". (Appendix A, at p. 3) In fact, no such allegation is contained in the complaint for search warrant, nor is there anything akin to it in the complaint. The complaint for search warrant is set out in full in Appendix E.

*Ga. Code Ann., §27-309; Ariz. Rev. Stat., §13-1446(E); Kansas St. Ann., §22-2509; D.C. Code, 1973, §23-524(g).

As the above reasons demonstrate, the question presented is so substantial as to require plenary consideration for its resolution. In the alternative, appellant requests that this Court summarily reverse the judgment below.

Respectfully submitted,

RALPH RUEBNER
Deputy Defender

Office of the State Appellate Defender
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5472

COUNSEL FOR APPELLANT

ALAN D. GOLDBERG
Assistant Defender
Of Counsel

EDITOR'S NOTE: APPENDICES A THROUGH E ATTACHED TO THE PETITION HAVE BEEN REPRINTED IN THE SEPARATE APPENDIX VOLUME.

Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA,

Appellant,

—*vs.*—

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.

JURISDICTIONAL STATEMENT FILED DECEMBER 22, 1978
PROBABLE JURISDICTION NOTED MARCH 26, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5937

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Appellant,

—*vs.*—

PEOPLE OF THE STATE OF ILLINOIS,

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APPEAL FROM THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.

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CHRONOLOGICAL LIST OF RELEVANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD, AND ORDERS ENTERED.

March 1, 1976—Search warrant issued.

March 2, 1976—Information filed.

March 25, 1976—Preliminary hearing held; probable cause found.

April 13, 1976—Indictment returned by the Grand Jury of Kane County, Illinois charging appellant with unlawful possession of a controlled substance.

April 20, 1976—Motion to suppress evidence filed by appellant.

April 23, 1976—Appellant arraigned; pleads not guilty.

May 6, 1976—Hearing on motion to suppress; motion denied.

May 28, 1976—Bench trial held; appellant found guilty as charged.

June 28, 1976—Sentencing hearing held; appellant sentenced to twenty-four (24) month term of probation.

June 30, 1976—Notice of appeal filed.

February 9, 1978—Opinion of the Appellate Court of Illinois, Second Judicial District.

April 7, 1978—Denial of Petition for Rehearing and Certificate of Importance by Appellate Court.

September 28, 1978—Petition for Leave to Appeal denied by the Supreme Court of Illinois.

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

CRIMINAL DIVISION

COMPLAINT FOR SEARCH WARRANT
SIGNED MARCH 1, 1976

The undersigned, Complainant herein, on oath (or by affirmation) says that he has reasonable grounds to believe that on or about February 29, 1976, in or about 79 S. LaSalle, Autora, Kane County, Illinois the following offenses were committed in violation of the cited provisions of the Illinois Revised Statutes, as amended, to-wit:

Possession of a Controlled Substance, Ch. 56½, Sec. 1401

Complainant states that he has reasonable grounds to believe that a search of the following place(s), thing(s), or persons(s), to-wit: (DESCRIBE PARTICULARLY)

79 S. LaSalle, Aurora, Illinois, the Aurora Tap Tavern which is the first floor of a two story brick structure with green wood trim. The entrance is a green wood frame door with an air conditioner installed above it. There is a "Miller High Life" sign in the front window and a "Schlitz" sign hanging outside the front door. Also the person of "Greg" the bartender, a male white with blondish hair, appx. 25 years.

will effectuate the seizure of the following described instrument(s), article(s), or thing(s) which have been used in the commission of, or which may constitute evidence of the aforesaid offense, to-wit: (DESCRIBED THE THINGS, ARTICLES, ETC. TO BE SEIZED)

Heroin, contraband, other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture, processing and distribution of controlled substances.

Complainant states that the facts upon which this Complaint is based are as follows: (SET FORTH THE FACTS LEADING TO THE REQUEST FOR ISSUANCE OF SEARCH WARRANT)

1. I, William Doster am a Special Agent employed by the Illinois Bureau of Investigation and have been so employed for the past six years. For the past four years I have been specifically assigned to the investigation of narcotic cases.

2. On March 1, 1976 I spoke with an informant who is known to me to be reliable in that on nine different occasions he has given me information which has resulted in nine arrests, four convictions and nine seizures. Also he has given me information on at least twenty-five other occasions which I have proven to be accurate through independent investigation. All information provided within past 12 months.

3. The informant related to me that over the weekend of 28 and 29 February he was in the tavern described and observed fifteen to twenty-five tin-foil packets on the person of the bartender "Greg" and behind the bar. He also has been in the tavern on at least ten other occasions and has observed tin-foil packets on "Greg" and in a drawer behind the bar. The informant has used heroin in the past and knows that tin-foil packets are a common method of packaging heroin.

4. The informant advised me that over the weekend of 28 and 29 February he had a conversation with "Greg" and was advised that "Greg" would have heroin for sale on Monday March 1, 1976. This conversation took place in the tavern described.

Complainant requests the issuance of a Search Warrant.

/s/ _____
WILLIAM DOSTER
Complainant

/s/ _____
JAMES W. CADWELL
Judge

Signed and sworn to before me March 1, 1976.

GERRY L. DONDANVILLE
State's Attorney of Kane County
404 County Courthouse
Geneva, Illinois 60134
Phone: 312/232-2400

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

CRIMINAL DIVISION

SEARCH WARRANT
ISSUED MARCH 1, 1976

of JAMES W. CADWELL, Judge of the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

TO ANY PEACE OFFICER OF THE STATE OF ILLINOIS, GREETING:

On this Day, William Doster, Complainant has signed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause and I therefore command that the following person or place:

79 S. LaSalle, Aurora, Illinois, which is called the Aurora Tap Tavern, the first floor of a two story brick structure with green wood trim. The entrance is a green wood frame door with an air-conditioner installed above it. There is a "Miller High Life" sign in front window, and a "Schlitz" sign hanging outside the front door. Also the person of "Greg", the bartender, a male white with blondish hair appx. 25 years.

be searched and the following instruments, articles or things which have been used in the commission of, or which constitute evidence of the offense of possession of a controlled substance be seized therefrom:

Heroin, contraband, other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture, processing and distribution of controlled substances.

I further command that a return and inventory of anything so seized shall be made without unnecessary delay before me or before any Court of competent jurisdiction.

/s/ _____
JAMES W. CADWELL
Judge

Time and date of issuance: 2:43 p.m., March 1, 1976

RETURN

(To be completed by officer executing search warrant)

I have duly executed the Search Warrant on the reverse hereof, by conducting a search of the therein described places(s), thing(s), or person(s), on March 1, 1976.

At the time of said Search (mark box applicable), a copy of this Search Warrant was:

Left with Betty Miller the person(s) from whom certain article(s), instrument(s), or thing(s) were seized.

Said Search Warrant was executed at 79 S. LaSalle 4:10 p.m. on said date.

Following is an inventory of items seized in the execution of said Search Warrant. (Attach additional sheets if additional space is required).

Six Tin Foil Packets
One Baggie With Green Plant-Like Substance
Hypodermic Needles
One Baggie With Green Plant-Like Substance
One Spoon
$7.00 U.S.C.
One Glass
Numerous Pull Tab Tickets
Several Packets Fireworks

Signed and sworn to before
3/2/76.

/s/ _____
JEROME JOHNSON
Officer

/s/ _____
JAMES W. CADWELL
Judge

GERRY L. DONDANVILLE
State's Attorney of Kane County
404 County Courthouse
Geneva, Illinois 60134
Phone: 312/232-2400

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

PRELIMINARY HEARING

TRANSCRIPT OF PROCEEDINGS
CONDUCTED MARCH 25, 1976

PRESENT: For the People of the State of Illinois:

GERRY L. DONDANVILLE, STATE'S ATTORNEY,

by

PATRICIA PIPER, ASSISTANT STATE'S ATTORNEY

and

THOMAS HOGAN, ASSISTANT STATE'S ATTORNEY

For the Defendant

HERBERT HILL, ATTORNEY AT LAW

[PH-2] MS. PIPER: Ybarra. Your Honor, this is case number 76-CF-9101. The defendant is charged with unlawful possession of a controlled substance. I believe it's been set for preliminary hearing this afternoon.

MR. HILL: We are prepared, your Honor.

THE COURT: Okay, set it at 1:30 this afternoon.

(Whereupon the case was passed until the afternoon, at which time the following proceedings were had.)

MR. HOGAN: Ventura Ybarra.

MR. HILL: Defense is ready.

THE COURT: Is the State ready?

MR. HOGAN: We're ready.

Whereupon,

JEROME JOHNSON,

called as a witness on behalf of the State, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOGAN:

Q Would you state your name, please?

A Jerome Johnson.

Q Your occupation?

A Special Agent with the Illinois Bureau of Investigation.

[PH-3] Q Mr. Johnson, were you on duty in that capacity on March 1, 1976?

A Yes, I was.

Q At approximately 4:25 p.m. on that date did you have an occasion to assist in the execution of a search warrant?

A Yes, I did.

Q Where did you assist in that execution of the search warrant?

A The Aurora Tap at 79 South LaSalle in Aurora.

Q Is that in Kane County?

A Yes, it was.

Q Who else was with you?

A Special Agent William Doster, Special Agents Moraitis, Santercier, and a few officers from the Aurora Police Department.

Q What happened when you went into the Aurora Tap?

A I went into the Aurora Tap. We announced our office; informed them that we were executing—that we had a search warrant for the premises. We then advised all patrons to rise in their seats for a cursory search for weapons. At that time Special Agent Doster ordered me to search one Ybarra for a controlled substance.

[PH-4] Q Did you do so?

A Yes, I did.

Q How did you conduct the search on Mr. Ybarra?

A Had Mr. Ybarra put his hands on the bar, and then I persisted to pat him down.

Q What happened during the pat down, if anything?

A During the pat down, I felt some objects that I felt to be heroin and I—

MR. HILL: I object, your Honor.
THE COURT: Objection will be sustained as to the words that I felt to be heroin.

BY MR. HOGAN:

Q You felt some objects, right?
A Right.
Q Where?
A In his right front pocket.
Q And then what did you do?
A I proceeded to take them from his pocket.
Q Okay. And what were they?
A They were tin foil packets which I opened up and examined and the contents were brown substance.
Q How many packets were there?
A As I remember correct, if my memory serves me correctly, there were five.
[PH-5] Q Did you open all five of them?
A Yes, I did.
Q And they were all the same type of substance inside?
A Correct.
Q Then what did you do?
A I advised Mr. Ybarra of his rights, placed him under arrest, and members of the Aurora Police Department transported him to the Aurora Police Station.
Q What did you do with these packets?
A I took the packets upstairs at the Aurora Police Station and conducted a field test.
Q And then what did you do with the packets?
A After the field test, which proved to be positive—
MR. HILL: Objection, your Honor; he asked what he did, not what the results were.
THE COURT: Sustained.

BY MR. HOGAN:

Q What did you do with the packets?
A I processed them.
Q What do you mean by processed them?

A I put them into Illinois Bureau of Investigation evidence envelope, put the proper heading on it as to exhibit number, what I thought it was, and transported it to the Joliet Bureau of Identification.
[PH-6] Q For what purpose?
A For analysis.
Q Did you ever receive a report back regarding the analysis?
A Yes, I did.
Q And do you know what that report said?
MR. HILL: Objection, your Honor; he's not the proper witness to testify as to what the report said.
THE COURT: Objection will be overruled. Is there a written report here?
MR. HOGAN: I have not submitted one for evidence, no.
THE COURT: I'm—if he's going to be testifying to what he read on a written report and you have that written report here, I'd like to have it produced. I'll let hearsay go in because this is a preliminary hearing, because if he's going to be testifying from a written document you have in your presence, I want it to be produced to let Mr. Hill look at it.
MR. HOGAN: I'll be very happy to show it to Mr. Hill.

BY MR. HOGAN:

[PH-7] Q Did you read the analysis report?
A Yes, I did.
Q Would you tell the Court what it said?
MR. HILL: The document speaks for itself.
THE COURT: I'll allow him to say what it says as long as they're going to allow you to see it. This is just a preliminary hearing.
THE WITNESS: The document stated that the substance was heroin.

BY MR. HOGAN:

Q Was the weight under or over 30 grams?
A Under.

Q Okay. Now, this Mr. Ybarra that you patted down, is he in Court today?
A Yes, he is.
Q Would you point him out for the benefit of the Court?
A The gentleman here with the orange shirt, long hair.
Q Sitting to the right of Mr. Hill?
A That's correct.
MR. HOGAN: Would you let the record reflect that he has identified the defendant in this case. I have no further questions of this witness, your Honor.
THE COURT: Mr. Hill, your witness.
[PH-8] MR. HOGAN: For the record, I will tender to Mr. Hill for purposes of cross examination a copy of Mr. Johnson's report and also a copy of the lab analysis report.

CROSS EXAMINATION

BY MR. HILL:

Q Mr. Johnson, prior to March 1, 1976, did you have occasion to make any or conduct any investigation with respect to the Aurora Tavern?
A Yes.
Q You personally?
A Yes.
Q And I take it that the officers who are also listed in this report might have conducted some investigation of that type, too?
A I can't testify as to that.
Q Did you at any time prior to the first day of March, 1976, observe Mr. Ybarra at that time?
A No.
Q Pardon?
A No.
Q Do you have any knowledge as to whether or not any of the other investigators might have observed him at that time?
[PH-9] A I have no such knowledge.

Q When did you—or strike that. Did you at your request seek a search warrant for those premises?
A No, I did not.
Q Do you know who might have obtained that search warrant?
A Yes, I do.
Q Who?
A Special Agent William Doster.
Q Is he also with the Illinois Bureau of Investigation?
A That's correct.
Q And did he—do you have any personal knowledge as to whether or not he had ever observed Mr. Ybarra at that establishment?
A No, I don't.
Q Do you know whether or not Mr. Ybarra owns that establishment?
A I have no knowledge.
Q Do you have any knowledge as to whether or not Mr. Ybarra works at that establishment?
A No, I don't.
Q And you had never seen him there prior to this date?
A Not to my knowledge.
[PH-10] Q You indicated that there was a general search of all the patrons that were there?
A Correct.
Q Do you have a copy of that search warrant that was obtained?
A I personally? No, not right now.
Q Did you ever observe that search warrant?
A Yes.
Q Did it mention anyone in particular?
MR. HOGAN: Your Honor, I'm going to object to any questions on the search warrant itself. We're not here on the search warrant. We're here on the results of the search warrant.
THE COURT: Sustained.
MR. HILL: Your Honor, this is establishing probable cause for the arrest of this defendant, and if they

are there pursuant to search warrant, I think we ought to know what the search warrant contained.

THE COURT: If you wish to file a motion to suppress based on lack of evidence, that is an issue. That isn't in issue today.

MR. HILL: I would assume, your Honor, that the issue today is probable cause to bind this [PH-11] defendant over to the Grand Jury.

THE COURT: As to whether he possessed heroin at the time, correct.

BY MR. HILL:

Q When you went into this tavern, Mr. Johnson, where did you find Mr. Ybarra?

A I found Mr. Ybarra at the front of the bar near the door—near the entrance.

Q Was he behind the bar?

A In front of the bar.

Q He was sitting in one of the patron seats?

A He was standing.

Q Along with other patrons?

A Correct.

Q And at the time that you observed Mr. Ybarra did you know at that time that he had committed a crime?

A No, I did not.

Q Had he done anything to the best of your knowledge that was a violation of any municipal ordinance?

A Not to my knowledge.

Q Had he done anything to the best of your knowledge at that time that was in violation of the statutes of the State of Illinois?

[PH-12] A Not at that time, no.

Q Was he engaging in any conduct that you could observe at that particular moment that might have been illegal?

A No.

Q And thereafter you conducted the search of his person?

A Correct.

Q Did he at any time prior to your search give you any indication that he was attempting to hide anything?

A No.

Q What was the distance between you and Mr. Ybarra at the time you first observed him?

A Approximately six, seven feet.

Q Did you notice anything about his person that might have given you the indication that he might have been carrying a weapon?

A I didn't hear that.

Q Would you read it back?

(Whereupon the Reporter read the pending question.)

A No.

Q As you observed Mr. Ybarra, were you in fear for [PH-13] any of your personal safety?

A Always on a search warrant.

Q Did he indicate to you in any manner by his objective actions that he had any weapon upon his person?

A That's a—that's an impossible question to answer.

Q Try to answer it.

A There is no way of telling; either he has it or he doesn't.

Q You did not—

A The only way you can find it is to conduct a search.

Q But you did not know that he had a weapon at that time?

A I didn't know that he did and I didn't know that he did not.

Q Where were his hands?

A On the bar.

Q Could you see a weapon on him?

A Did I see a weapon on him? No.

Q How was he dressed?

A Casually: slacks, jacket.

Q You noticed nothing protruding from his jacket?

A No.

Q You noticed nothing protruding from his slacks?

A No.

[PH-14] Q You did not feel that he was about to attack you in any way, did you?

A Attack me? I can't say. I can't answer that. I don't know what his intentions were.

MR. HILL: I have no further questions, your Honor.

MR. HOGAN: I have nothing further, your Honor.

THE COURT: Thank you, Mr. Johnson.

(Whereupon the witness was excused.)

MR. HOGAN: The People would rest.

THE COURT: Does the defense have anything to offer?

MR. HILL: No, we have no witnesses, your Honor.

THE COURT: The State?

MR. HOGAN: No, sir.

MR. HILL: I believe the testimony of the officer with respect to any conduct that Mr. Ybarra might have been engaged in gave the appearance of any criminal activity was negated by the police officer's testimony. And on the basis of that there certainly appears by this record no basis for which anyone from the Illinois Bureau of [PH-15] Investigation or the Aurora Police Department or the County Sheriff's Office might have engaged in any search of his person.

And I suggest to the Court that if there was any basis for a warrant, that the basis for that warrant was applicable probably to the owner of that establishment to which this officer testifies that he was not; that he was a patron there; that he had engaged in no activity that appeared to be criminal.

And I believe on the basis of that conduct, the general search of his person when there is nothing that suggested that his life was in peril or that he was about to commit a crime, in unconstitutional; that the evidence that was taken against him should not be used; that there is no probable cause to submit this thing to the Grand Jury.

MR. HOGAN: I'll stand on the evidence taken.

THE COURT: You know, even though what you say may be true, but you had no objection to the evi-

dence as it went in at the preliminary hearing. That may be the subject of a motion to suppress. It being in the record over no objection of yourself, I feel there is probable cause. The defendant will be held to answer. He is out on bond; his bond will continue.

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS

v.

VENTURA E. YBARRA, DEFENDANT(S)

BILL OF INDICTMENT

FILED APRIL 13, 1976

GENERAL NUMBER 76 CF 9101

THE GRAND JURY CHARGES THAT on or about March 1, 1976, VENTURA E. YBARRA, committed the offense of UNLAWFUL POSSESSION OF CONTROLLED SUBSTANCE (Cl.3 fel.) in violation of Chapter 56½, Section 1402, of the Illinois Revised Statutes, as amended, in that he did knowingly possess less than 30 grams of a substances [sic] or substances containing Heroin, otherwise than as authorized in the Controlled Substances Act,

All of the foregoing occurred in Kane County, Illinois.

A TRUE BILL

/s/ _____
Foreman of the Grand Jury

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

MOTION TO SUPPRESS EVIDENCE

FILED APRIL 20, 1976

[CAPTION OMITTED IN PRINTING]

Now comes VENTURA E. YBARRA, defendant, by HERBERT HILL his attorney and moves the court, pursuant to the applicable provisions of the Illinois Supreme Court Rules and the Code of Criminal Procedure, for the entry of an order suppressing the tangible things described below as evidence in this cause, and directing that no evidence be heard as to said tangible things or any evidence procured from or by use of said tangible things be heard during the trial of this cause.

In support of his motion defendant alleges and states as follows:

1. That defendant is a resident citizen of the city of Aurora, County of Kane, and State of Illinois.
2. That on or about the 1st day of March, 1976, police officers of the city of Aurora, County of Kane and State of Illinois together with certain investigation agents of the Illinois Bureau of Investigation, namely, Jerome Johnson, without any warrant or process of law respecting defendant, and without any reasonable or probable grounds to believe that the defendant had committed, was committing or was about to commit any act violative of a municipal state or federal statute, and without the consent or permission of defendant, forced defendant to undergo a generalized search of his person, prior to his arrest, as defendant was a patron, lawfully upon the premises of 79 S. LaSalle Street, Aurora, Illinois, (a drinking establishment within said city and commonly known as "The Aurora Tap"), seizing therefrom certain tangible items including the items alleged in the information herein to be a controlled substance reputed to be

Herion [sic] in an amount less than 30 grams, and other items.

All of said tangible items are now in the possession of the Illinois Bureau of Investigation, its supportive agencies or the Office of the State's Attorney of Kane County, Illinois and are being held by them for use in support of the allegation herein contained.

3. That the aforesaid search and seizure was violative of defendant's rights under the *fourth*, *fifth* and *fourteenth amendments* to *the Constitution of the U.S.*, and further violative of defendant's rights under Article II, Sections 2, 6 and 10 of the Constitution of the State of Illinois.

Respectfully submitted,

/s/ _____

HERBERT HILL
Attorney for Defendant,
VENTURA YBARRA

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

ARRAIGNMENT

TRANSCRIPT OF PROCEEDINGS
CONDUCTED APRIL 23, 1976

PRESENT: FOR THE PEOPLE OF THE
STATE OF ILLINOIS:

GARY L. DONDANVILLE
STATE'S ATTORNEY, BY
THOMAS E. HOGAN,
ASSISTANT STATE'S ATTORNEY

FOR THE DEFENDANT

HERBERT HILL
ATTORNEY AT LAW

* * * *

[ARR.-2] MR. HOGAN: Your Honor, in case number 76 CF 9101, Mr. Ybarra has been charged with the offense of Unlawful Possession of a Controlled Substance, a Class III Felony. If convicted of that charge, he could be sent to the penitentiary for a minimum of one and up to a maximum of ten years. If he were so imprisoned, he would be subject to a three-year period of parole following discharge from prison. And in addition thereto, he may be fined up to the sum of $15,000.

THE COURT: What is your name, please?

VENTURA YBARRA: Ventura E. Ybarra.

THE COURT: And your age?

VENTURA YBARRA: Twenty-four.

THE COURT: You are represented by Attorney Hill?

VENTURA YBARRA: Yes.

THE COURT: Have you received a copy of the Indictment and List of the Grand Jury Witnesses?

MR. HILL: We have been tendered a copy of the Indictment in this case, your Honor. There is no attendant List of Witnesses.

THE COURT: Are you prepared to plea?

MR. HILL: Yes, we are.

THE COURT: What is your plea?

[ARR.-3] MR. HILL: Entering a plea of Not Guilty and demanding Jury trial.

THE COURT: Cause assigned to Judge Krause. Motion date, May 7. Not Guilty plea entered and Jury demand entered. Pre-trial, May 13. Any motions?

MR. HILL: Yes, your Honor. There is pending a Motion to Suppress and I am tendering to the State at this time a Discovery Motion.

THE COURT: All right. Leave granted to file Defendant's Discovery Motion. Delivery made in open Court.

MR. HOGAN: Your Honor, at this time the State would ask to file the original of the People's Omnibus Discovery Motion; serve a copy on Mr. Hill and ask him to acknowledge receipt of the same.

MR. HILL: Defense acknowledges receipt of the Discovery Motion, your Honor.

THE COURT: Leave granted to file People's Omnibus Discovery; service had in open Court on counsel. Pending motions will be heard by the trial judge.

MR. HOGAN: And as far as the discovery motion, we will acknowledge receipt of the Defendant's Discovery Motion. This Defendant is out on bond and we would have no objection to the same bond remaining in full force and effect.

[ARR.-4] THE COURT: Present bond continued. Anything else?

MR. HOGAN: Not on this case.

THE COURT: Next case.

* * * *

(WHICH were all the proceedings had and testimony taken at the hearing of the above-entitled cause.)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

HEARING ON MOTION TO SUPPRESS

TRANSCRIPT OF PROCEEDINGS
CONDUCTED MAY 6, 1976

PRESENT: FOR THE PEOPLE OF THE
STATE OF ILLINOIS:

GARY L. DONDANVILLE
STATE'S ATTORNEY, BY
DONALD C. HUDSON
ASSISTANT STATE'S ATTORNEY

FOR THE DEFENDANT

HERBERT HILL
ATTORNEY AT LAW

[R-19] MR. HUDSON: Judge, coming before the Court at this time is the case entitled People vs. Ventura, V-e-n-t-u-r-a, E. Ybarra, Y-b-a-r-r-a.

The Defendant in this case 76 CF 9101 has been charged with the Unlawful Possession of a Controlled Substance, a single Count Indictment. The matter comes before you today on the Defendant's Motion to Suppress evidence seized.

Mr. Hill is present here along with the Defendant. I'm prepared to proceed.

MR. HILL: Good afternoon, Your Honor. We are ready to proceed on the Motion. Defendant would call in this respect Investigator Jerome Johnson.

(Witness sworn.)

JEROME JOHNSON,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. HILL:

Q Would you state your name and spell your last name for the Reporter?
A Jerome Johnson, J-o-h-n-s-o-n.
Q What is the nature of your employment?
[R-20] A Illinois Bureau of Investigation.
Q And were you working for the Illinois Bureau of Investigation on or about the 1st day of March, 1976?
A Yes, I was.
Q On that date did you have occasion to be at or near an address in Aurora known as 79 South LaSalle Street?
A I believe so.
Q To the best of your knowledge is that a drinking establishment located within the City of Aurora?
A Yes, it is.
Q And to the best of your knowledge is that establishment open to the public as a drinking establishment?
A I didn't hear the whole question.
Q Is that establishment open to the public as a normal drinking establishment?
A Yes.
Q And it is commonly known as the Aurora Tap?
A That's right.
Q And you had occasion to be there at approximately 4:10 p.m. on that date?
A Day. To the best of my knowledge, yes.
Q Were you there with anyone else?
A Yes.
Q Who were you there with?
[R-21] A Special Agent Doster, Moraitis, Detective Weaver, Lieutenant Williams, and several other uniformed officers from the Aurora Police Department.
Q Now, was Investigator Doster uniformed?
A No.

Q Those individuals that you named, Weaver, Williams and other people from Aurora, were they all uniformed?
A Some of them were.
Q And at that location did you have occasion to participate in the execution of a Search Warrant?
A Yes, I did.
Q And did the Warrant pertain to the premises of 79 South LaSalle Street?
A Yes, it did.
Q Did it also specify any particular individual that you sought to have executed that Warrant against?
A No, it did not.
Q Had you looked at a copy of that Warrant, Officer?
A What are you talking about, before or after?
Q Before.
A Just briefly.
MR. HILL: Will the Court Reporter mark this as Defendant's Exhibit No. 1 for identification?

(Exhibit marked as requested.)

[R-22] BY MR. HILL:

Q I show you what previously was marked as Defendant's Exhibit 1 for identification and identified as a Warrant issued upon the premises at 79 South LaSalle Street in the City of Aurora, which also bears the general file No. 76 MR 2134.
Are you familiar with that document?
A Vaguely, yes.
Q And is there any specificity within this document that identifies any particular individual?
MR. HUDSON: Objection, Your Honor, the document speaks for itself.
THE COURT: Objection sustained.
MR. HILL: Okay.

BY MR. HILL:

Q When you went—
THE COURT: That is identified as the Search Warrant that this alleged situation arose out of?

MR. HUDSON: That's correct.
MR. HILL: You have no objection to the admission of that in evidence?
MR. HUDSON: I have objection. I believe it's part of the Court record at this time.
THE COURT: Not in this case.
[R-23] MR. HUDSON: Not in this?
THE COURT: No. Under the MR.
MR. HUDSON: I'd stipulate that is the document under which he executed the Warrant, but I don't think he should be reading from it. If you want to have it admitted, fine.
MR. HILL: Would you further stipulate this document does not in any way refer to Mr. Ybarra?
THE COURT: The document speaks for itself.
MR. HUDSON: It speaks for itself.
MR. HILL: Fine.

BY MR. HILL:

Q When you went into this establishment—
THE COURT: For the record, it may be admitted, identification stricken.

(Whereupon said exhibit, marked Defendant's Exhibit No. 1, so offered and received in evidence, is made a part hereof:)

* * * *

[R-25] BY MR. HILL:

Q Mr. Johnson, when you arrived at the Aurora Tavern, how many people were there?
A Can't say exactly. Approximately nine to twelve.
Q And did you go there looking for a specific person?
A No.
Q Did you know any of the twelve people that were there?
A No.
Q Had you seen any of those twelve people before?
A No.

Q How was that establishment lighted, Mr. Johnson?
A How is it lighted?
Q Yes.
A You mean in what manner, or bright, low, dim?
Q Where you able to observe the people that were there?
A Yes.
Q Calling your attention specifically to one Ventura Ybarra, do you know approximately where he might have been in relation to where you were when you first entered the tavern?
A Yes.
[R-26] Q Where was he?
A Immediately to my left standing near the pinball machine.
Q Were his hands visible to you?
A Not at that time, no.
Q How was he dressed?
A Very casually. All I can remember, he had on a red and black checkered jacket.
Q And did you notice anything protruding from his jacket?
A No.
Q Did you notice anything protruding from his pants?
A No.
Q Did you notice at that time he had a weapon on his person?
A No.
Q Did he give you any indication he had a weapon on his person?
A No, he did not.
Q Was he standing in an area where all of the other patrons were?
A In the general vicinity, yes.
Q And as you approached him did you order him to [R-27] stand to be searched?
A No.
Q Did you order anyone to stand to be searched?
A Yes.

Q All of the people that were there?
A Right.
Q So that statement was spoken generally to everyone?
A Right.
Q No one in particular?
A No one in particular.
Q At the time you undertook to search Mr. Ybarra, did you know Mr. Ybarra had committed a crime?
A No.
Q Did you know Mr. Ybarra had done anything that was violative of the Ordinances of the City of Aurora?
A No.
Q Or of the State of Illinois?
A No.
Q Or of any Federal Statute?
A No.
Q Or any of the other patrons that were there?
A No.
Q And thereafter you conducted a search of Mr. [R-28] Ybarra's person, is that correct?
A That's correct.
Q He moved—He did not move towards you?
A No.
Q Did he give you any gestures or overt actions indicative of criminal conduct?
A No.
Q And when you placed your hands upon Mr. Ybarra's person did you feel any weapons?
A No.
Q On how many occasions did you search Mr. Ybarra?
A Twice.
Q Twice?
A Right.
Q First time that you went through Mr. Ybarra's person you found nothing upon him, is that correct?
A Correct.
Q And thereafter you searched him again?
A Correct.

Q Now, following the first time did he move from the position that he had been standing?
A Not to my knowledge.
Q Did he give you any gestures as if he was coming towards you?
[R-29] A No.
Q Did he move toward any of the other Officers that were there?
A Not to my knowledge.
Q Did he act in any threatening or insulting manner toward you or the other Officers?
A No, he did not.
Q Did he say anything to you?
A No.
Q Did he say anything to any of the other Officers?
A I can't testify to that.
Q Did you have him in your observation at that time during the course of your search of him?
A Not the whole time, no.
Q Now, after not finding anything on the first occasion that you had patted his person, did you have occasion to do it again?
A That's correct.
Q Approximately how long after the first time did you search him the second time?
A Two, three minutes.
Q And between the time intervening the first search and second search did he come into contact with anyone other than police officers?
[R-30] A I can't testify, I don't know.
Q Prior to the second search did you notice anything on his person that gave you the indication of a weapon?
A None.
Q Now, prior to the second search were his hands visible to you?
A Yes.
Q Did you notice anything in his hands?
A Nothing other than—No, nothing.
Q And thereafter you searched him again?
A Correct.

Q And you removed certain items from his pocket?
A That's correct.
MR. HILL: No further questions.

EXAMINATION

BY MR. HUDSON:

Q Officer—Special Agent Johnson, you indicated you were there at the Aurora Tap pursuant to a Search Warrant, is that correct?
A That's correct.
Q When you entered the Aurora Tap did you announce your office and your purpose for being there?
A That's correct.
[R-31] Q Would you describe the interior of the Aurora Tap as you entered it?
A That's kind of hard. We entered the door, of course, announced our office, what we were there for, advised the people to stay where they were, we were going to make a cursory search for weapons.
And the place is a very dismal, drab, very plain, almost shabby type establishment, and that's the best I can describe it. Real shabby.
Q Was there a bar there?
A Oh, yes.
Q Where was the bar in relation to your position when you first entered the tap?
A To my immediate left.
Q Was Mr. Ybarra visible when you entered the premises?
A Yes.
Q The other patrons, where were they with respect to the bar? Are there any tables in there?
A I can't really say, but all the patrons that were there were seated at the bar, on or near the bar.
Q All seated at the bar other than Mr. Ybarra?
A Yes.
Q Was there anyone near him by the pinball machine [R-32] by the door?
A There were people sitting next to him at the bar.

Q Okay. Was he standing or seated when you first observed him?
A He was standing.
Q Were the other people standing or seated?
A Some were standing, some were sitting.
Q You indicated about what, twelve people in the bar at the time?
A Yes.
Q Do you recall how many entrances and exits there are in that particular establishment?
A One entrance and one exit.
Q Okay. And where was the entrance or exits with respect to where Mr. Ybarra was?
A Ybarra was approximately eight feet away from the main entrance, front entrance.
Q Have you ever participated in the execution of a Search Warrant before?
A Oh, yes.
Q Is it part of your standing procedure to announce your presence and office when you enter?
MR. HILL: I object.
[R-33] THE WITNESS: Correct.
THE COURT: Objection sustained.

BY MR. HUDSON:

Q Officer, when you first arrived what was Mr. Ybarra doing, do you recall?
A If my memory serves me correctly he was standing at the bar drinking a beer.
Q Was he wearing a coat or any outer garments or anything?
A Yes, he had on what looked to be a flannel red and black checkered jacket.
Q Okay. Were there any other—There were other patrons, were they searched also?
A Everyone was searched.
Q Everyone was searched?
A That's right.

Q Okay. I believe you have indicated you conducted two searches of Mr. Ybarra?

A That's correct.

Q Would you describe the first one for us, please? Was it a search, a pat down or what?

A More or less a pat down, cursory search for weapons for our protection.

Q And then how much time elapsed between the [R-34] first and second search?

A Two to three minutes, no more.

Q Did you feel anything during the first search?

MR. HILL: Objection, Your Honor.

THE COURT: Overruled.

BY MR. HUDSON:

Q Did you feel anything during the first search?

A Yes.

Q What did you feel?

A I felt—

Q Describe what you felt.

A I felt a cigarette pack with objects in it.

Q Okay. The other patrons were then searched?

A Yes.

Q Three minutes later you went back to Mr. Ybarra and conducted a search of his pockets specifically, is that correct?

A Yes.

Q Did you have Mr. Ybarra in your constant visual observation from the time you first patted him down until the time you went back?

A Not the whole time, no.

Q So he was out of your observation?

A Yes.

[R-35] Q Did anyone move during the time of the first search of Mr. Ybarra and the second one?

A Not to my knowledge.

MR. HUDSON: I have no further questions, Your Honor.

MR. HILL: I have no questions.

THE COURT: Any other witnesses?

MR. HILL: No further witnesses, Your Honor.

THE COURT: State have any witnesses?

MR. HUDSON: No, Judge, we won't call any witnesses.

THE COURT: All right.

MR. HILL: Your Honor, I don't think that, considering the testimony of the Officer, that there's any question that there's a total and absolute lack of probable cause with respect to this Defendant committing any kind of an offense either before the first—the first search or cursory pat down, as the Officer testified, of the Defendant's person, and prior to the second one. There was certainly nothing that would give the Officer any indication that he ought to—

THE COURT: Do either one have cases?

MR. HUDSON: Yes, I have cases.

MR. HILL: Yes.

THE COURT: Okay. I think the facts are clear that the first search was, as the Officer said, for his own [R-36] protection, and then he felt something, a cigarette pack with objects in it, and he went back to check that.

Now, that's the question. What do your cases say? I don't think we need to argue the facts, I just heard them. I don't think you're going to convince me that I didn't hear something I did hear, or vice versa, but I would be interested in what the cases say about the set of facts.

MR. HILL: Your Honor, under this circumstance, Your Honor, the search would be considered a search in the line of stop and frisk even though the Officers, they're armed with a Warrant, they are there for the purposes of discovering items that are listed within the Search Warrant itself, and to search particularly the person that is named in that Warrant.

I'm calling the Court's attention to the Warrant that has been received into evidence. It's for the—to search the premises of 79 South LaSalle, commonly known as the Aurora Tap, and also the person of Greg the bartender.

Now, there's been no testimony as to whether or not Greg was there. Presumptively he was not. The premises were searched and nowhere in this Search Warrant is there any authority or any basis for which the police officers [R-37] of the City of Aurora or the IBI, or anyone else as far as that matter goes, has the right to search any and all of the patrons that are upon that property.

Now, calling the Court's attention to People vs. Felton, 20 Ill. App. 3d 103, the Court here holds that a search may not precede an arrest and serve as part of its justification.

Furthermore, looks, gestures and movements taken alone are insufficient to constitute probable cause since they may, in fact, be consistent with innocence and they would not provide any kind of a basis for which an arresting officer ought to be engaging in a general search of people upon the premises.

Secondly—or thirdly is that absent any showing of probable cause to search the principles limiting the search itself are those principles applicable to stop and frisk type situations.

Further, going on, three restrictions are placed upon the right of policemen to stop and frisk individuals suspected of criminal acts—and I point the Court's attention first to the fact that the Officer testified that he's not even of the suspicion this Defendant has committed any criminal act—but those three restrictions are, I would go on to say, are that the [R-38] Officer would be justified by specific and articulable facts which, when taken together with reasonable inference from the facts would reasonably warrant an intrusion upon that person.

Here we have nothing specific and nothing articulable about this situation relating to Mr. Ybarra.

Secondly, assuming a valid stop—and we do not have a valid stop in this situation—the limited search of suspects is justified only if a reasonably prudent man in the circumstances would be warranted believing his safety or the safety of others was in danger.

He testified as to the total exclusion of that kind of circumstance.

And third, that the authorized search is confined in scope to an intrusion reasonably designed to discover objects capable of use as weapons.

He testified his first examination of Mr. Ybarra revealed nothing in the nature of a weapon, and if nothing more, a pack of cigarettes with something inside. He has no knowledge of—or that would not, obviously, be in plain view and, therefore, would not fall within the perview of any of the cases relating to a search justified upon that basis.

[R-39] Following this case, Your Honor, there is People vs. Harshbarger, 24 Ill. App. 3d 335.

This is a case of somewhat similar circumstances. Here the police are on premises that belong to a Defendant where they smell what they assume to be burning marijuana. When going into those premises they find three individuals sitting in a living room, and they conduct—on the theory of following the smell of this burning marijuana—a general search of the person of those three people that are there.

The Defendant is found to have possessed marijuana at the time this search was conducted.

The Court here held that an Officer making an arrest without a Warrant must have probable cause to believe that a criminal offense has been committed and that the person to be arrested committed it, and that is, he must have reasonable grounds or some knowledge of facts upon which to base his belief that such a person is guilty of or implicated in a crime, and mere suspicion in the Officer's mind unsupported by such facts is insufficient to support an arrest or a search incident thereto.

The Court goes on to say that while it is necessary in the interest of crime prevention to give [R-40] substantial latitude to police officers in making a warrantless arrest, yet, in doing so, the constitutional guaranty to all citizens to be secure in their persons, houses, property and effects against unreasonable searches and seizures, must be observed.

Now, consistent with this case and the plethora of cases that follow from the Weeks and all other cases relating to the exclusionary rule, the Supreme Court has been somewhat tenacious of its guarding of the rights of an individual to be secure from an unreasonable search.

The Supreme Court has said that there is a basis for a search if that search is founded upon some reasonable relation to the factual situation in which the police officer may be subjecting himself.

Using that same reasoning, and using the same analogy, the Court in People vs. McCarty, 296 N.E. 2d 862 related the following sets of circumstances: Even assuming the case in which Defendant was merely suspected of having some connection—some connection the Court says—with a person recently arrested for possession of marijuana and in which police had no warrant and no reasonable grounds to think that the Defendant had committed any crime, this particular Defendant perhaps [R-41] might have been the proper subject for frisking for weapons as the Defendant was walking in the vicinity of the police station, but the officer, upon determining, by a pat down, that Defendant's coat pocket did not contain a weapon, had no right—articulable fact—had no right to remove any soft plastic bag from the Defendant's pocket. That is substantially much more closer to the factual situation that we have.

Going further, People vs. Ortiz, 305 N.E. 2d 205: Where there is no reasonable ground to believe that a warrant had been issued for the Defendant in Illinois or any other jurisdiction, and there was no warrant, no reason to believe that the Defendant was committing or had committed any offense, and that there was no evidence that there was any reasonable grounds for any arrest, or even a stop and frisk, before attempted search, any warrantless search or arrest of that Defendant is absolutely invalid.

In People vs. Cassell, 243 N.E. 2d 363, in a hearing on a motion to suppress evidence allegedly seized in an illegal search and seizure, the Defendant's evidence that the police officer had no Warrant, and that the Defendant was doing nothing unusual when the police officers stopped him, makes a prima facie case [R-42] that the police officers lacked probable cause for the arrest or subsequent search.

The cases that follow are similar in import.

I believe the State will present to the Court the fact that there is an existence of Statute that says that a police officer—

THE COURT: Why wouldn't the State do it then? Are you going to argue for them?

MR. HILL: No, I'd want to say something in response to that Statute.

THE COURT: You'll have an opportunity to.

MR. HILL: Then I would accede to the State.

MR. HUDSON: Judge, if Mr. Hill has alluded to—First of all, I think the cases he has cited are not in point. We're talking about a case in which the police are at the Aurora Tap pursuant to a Search Warrant, which Mr. Hill has himself moved to have admitted into evidence.

THE COURT: Can I see the Search Warrant?

(Document tendered.)

MR. HUDSON: That has not been challenged in this case, as Your Honor knows. And he has not mentioned—or has glossed over certain statutory provisions set forth in the Criminal Code which outline the police officers authority when they are present on the premises pursuant [R-43] to a Search Warrant, and I specifically call the Court's attention to Section 108-9 of the Illinois Criminal Code dealing with an officer's right to detain and search persons on the premises when a Search Warrant is being executed.

I cite to the Court that section which says:

> "In the execution of the Warrant the person executing the same may reasonably detain to search any person in the place at the time: (a) To protect himself from attack, or (b) to prevent the disposal or concealment of any instruments, articles or things particularly described in the Warrant."

Mr. Hill also mentioned something interesting. He says the police were there to search for certain items named in the Warrant, namely, heroin, contraband and other things.

I would cite to the Court the case of People vs. Pugh, 69 Ill. App. 2d 312; 217 N.E. 2d 557, a 1966 case which is the first case to construe the language and import of the section I have cited, and is still good law, I have shepardised it and it's the leading case.

In this case the facts are beyond what we have here. The police searched an apartment in Chicago. Officers [R-44] were admitted into the apartment, they identified themselves as police officers, showed the Search Warrant to Jessie Pugh, who became one of the Defendants, who lived there. They began a search of the apartment. About fifteen minutes later Raymond Pugh, the other Defendant, rang the doorbell, and at the direction of an Officer was admitted to the apartment.

He was then searched, and 42 foil packets containing heroin were removed from his pants pocket, and he was subsequently arrested. He thereupon made a motion to suppress to the Trial Court which was denied, and the Court says:

> "In support of his motion to suppress the narcotics removed from his person when he entered the apartment, the other Defendant, Raymond Pugh argues that he was first searched and then arrested without probable cause."

I think that contention is analogous to what Mr. Hill is claiming here. And the Court then cites the section I have cited, and they state:

> "We feel that under the same rationale as set forth in the Statute the police while engaged in the search had reasonable grounds to search Raymond Pugh as well. We agree with the [R-45] State that the execution of Search Warrants in narcotics cases is a risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the Defendant onto premises where the police have reason to believe narcotics are concealed provides further grounds for his search."

Thereupon they affirmed the conviction and upheld the search.

To put it another way, Judge, I think the sections say when the police officers are executing a Search Warrant, the people who are there are also part of the premises. It's quite possible they could have on them articles and things named in the Search Warrant, and as the Officer testified he did pat down the Defendant, he felt tinfoil packages in there, and they have—

THE COURT: He said he felt an object.

MR. HUDSON: Yes. They have a right to seize objects pursuant to the Search Warrant. I think the case—it's been cited previously, if items or materials to be there could be disposed of the police have a right to search for the specific item. The people are there. They don't need [R-46] probable cause. That's not what we're talking about, I agree. There isn't probable cause to search. This isn't the case. We're talking about a statutory ritual of the police authority set forth. I think the cases say they have a right to do so.

MR. HILL: As far as the Pugh case is concerned, Your Honor, I would like to point out that that case dealt with a search that was being conducted pursuant to a Warrant of private residential property, and it is certainly distinguishable from the facts we have here.

THE COURT: Do you have any case where that's been distinguished though?

MR. HILL: No. There are no distinguishing cases from that, that is the only—

THE COURT: In your mind you feel that distinguishes it?

MR. HILL: Yes. That is the only case that is decided in the State of Illinois that even bears any reasonable attempt to make an interpretation of that Statute.

MR. HUDSON: I can debate that, but I'm not going to argue that. I have other cases.

MR. HILL: It indicates, Your Honor, in this instance we have the police conducting a search upon private [R-47] property and an individual coming upon that property who is related to the Defendant who was the subject matter—one of the Defendants that is—who is the subject matter of the Search Warrant being issued. There perhaps it might be distinguishable in that there is some connection with the property, and furthermore, it may be distinguishable upon the fact it is being issued upon private residential property as opposed to public property.

The instance we have, the Warrant being applied to the Aurora Tavern, is analogous to a situation where, pursuant to some order of the Court, if we assume that a Warrant may go out for the search or the conduct of the search of property located at Highway 65 and 59, commonly known as Marshall Field, the first floor of that property, and specifically the person themselves, clerk, does that in and of itself, the issuance of that Warrant specifying that particular property, justify the police have any nature to search any and all patrons upon that property? I say that is absolutely absurd and I do not think it is the spirit of the Statute to grant that kind of unlimited authority to the police to conduct that kind of general investigation.

And even if they were to have that right, Your Honor, I would believe that pursuant to the Officer's [R-48] testimony he says he conducted a pat down of the Defendant and he found nothing, but he did feel some object that he could not see and he did not have knowledge of, and he has no right to pry, pursuant to a violation of the Fourth Amendment, at that point into what the contents of that package was as long as it was not anything that was going to be potently harmful or dangerous to him or anyone else that perhaps might have been upon the property.

I don't think it's within the perview of that section to give that wide of a latitude. Are we to assume further

that a Warrant issued to conduct a search on the premises commonly known as the Fox Valley Restaurant will give the police the right to search everyone that is there? I don't think that is the spirit in which that particular section was written, and I don't think that there are any cases that would justify that point. That is what we have. That's distinguishable from Pugh.

And I think that as far as that goes, the constitutionality of the section that the State relies upon is certainly at issue, and I think in that respect there are numerous other authorities that relate this fact.

Professor LaFave of the University of Illinois Law Forum in a 1966 publication, following the passage of [R-49] the section that the State is referring to, reflects the fact that the constitutionality of this section is suspect at most. And this article, I might point out to the Court, has been cited with authority by every major law honorarium in the country, including Yale, Harvard, Dartmouth, University of Illinois, et cetera. This article was reported at page 266, Volume 1966 of the Illinois Law Review.

The Court here—the article here attacks—perhaps questions the constitutional validity of the statute that is written on the basis of United States vs. DiRi, cited as 68 Sup. Ct. 222, in which the author discusses that:

> "The constitutionality of the above statute remains in serious doubt because of the attitude of the Supreme Court as expressed in United States vs. DiRi. There the Government claimed that search of a passenger in an automobile was justified as incident to the right to search the vehicle without warrant upon a showing of probable cause."

The Court here holds that:

> "The Government says it would not contend that, armed with a search warrant for a residence [R-50] only, it could search all persons found in it."

an admission on behalf of the Government.

> "But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued."

Therefore, by analogy, the Court goes on reason that if the Government accedes the fact that it does not have the right to go so far as to search the guests in the house on this theory then it certainly would have no right to search of the people in the automobile.

And the other discussion that:

> "The extent to which the Illinois statute may be reconciled with the views expressed in DiRi will depend upon the interpretation which is given the statute and upon the application of DiRi to somewhat different facts. Narrowly read, the language quoted above may be taken to mean that the mere status of 'guest' at the place which may lawfully be searched is not [R-51] enough, but that possibly someone with a closer connection with that place might be searched. Such an interpretation might be given to the Illinois statute, although nothing on the face of the statute seems to compel this result. It is submitted that a realistic appraisal of the situation facing the officer executing a search warrant compels the conclusion that under some circumstances a right to search occupants of the place named in the warrant is essential. The unresolved question is what connection must exist between the person and the premises and what other circumstances must be present to justify such action."

And here we have nothing articulable by any stretch of the imagination that justifies the Officer of any search other than a cursory search and following the cursory search he finds nothing.

We submit to the Court that having gone as far as he did, he had no right to proceed any further, and we refer the Court to the cases that were previously cited as authority for that proposition, and ask the Court respectfully to suppress the evidence obtained from Mr. Ybarra as a result of the search that was conducted [R-52] on the 1st of March, 1976.

THE COURT: Let me see your case.

MR. HUDSON: This second case. In response to Mr. Hill's—

THE COURT: You don't have any response.

MR. HUDSON: I realize that. I thought the Court might want to consider two cases. I won't comment on them.

THE COURT: This case was a gas station? (Indicating.)

MR. HUDSON: Right, public place.

THE COURT: I think that's the key to the whole thing. First of all, not to keep anyone in suspense, I'll deny the motion to suppress for the following reasons: I feel it was made pursuant to statute. Mr. LaFave—or Professor LaFave's doubts about it seem to have been resolved by at least two cases. Granted both of them are Appellate Court cases, they might well still—could be reversed either in the State or Federal systems, but at least for the time being I would accept them as being the law.

I would make the finding of fact that the search for weapons was conducted and that search was under Section (b): To prevent the disposal or concealment of any instrument, article or things described in the Search [R-53] Warrant.

The Search Warrant has not been in any way challenged, and, indeed, stipulated to, and heroin was one of the items. So, it gets to the reasonableness.

It might well not be reasonable to search 350 people on the first floor of Marshall Field, but we're talking about, by description, a rather small tavern. A Search Warrant has been issued pursuant to the fact that it is known that there are activities going on there, and these

are the—might well be some of the concealment of the articles or things particularly described in the Search Warrant. So, I feel under that section it qualifies as a lawful search, and further, that the Federal law doesn't pertain to any Statute. Evidently Federal authorities at this time do not have a similar Statute. And also, as I say, LaFave's points are not well founded because here are two cases. (Indicating.)

LaFave may in the end be right, but at this point in time he's not according to these cases. All right.

MR. HUDSON: Thank you, Judge.

THE COURT: So, where do we go from here?

MR. HILL: Well, if the Defendant—are we off the record?

[R-54] THE COURT: Off the record.

(Which were all of the proceedings had at the hearing in said cause.)

IN THE CIRCUIT FOR THE SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

No. 76-CF-9101

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF,

v.

VENTURA E. YBARRA, DEFENDANT

ORDER

ENTERED MAY 6, 1976

This matter having come on before the Court on the defendant's motion to suppress the physical evidence seized in this cause; the Court having heard all of the evidence presented; the arguments of counsel and being fully advised in the premises; and based upon findings of fact and conclusions of law stated in the record;

The Court being fully advised in the premises:

It is hereby ordered that:

The defendant's motion to suppress the evidence seized in this cause be and is hereby denied in toto.

/s/ _____

JOHN A. KRAUSE, JUDGE

Enter this 6th day of May, 1976.

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

TRIAL

TRANSCRIPT OF PROCEEDINGS

CONDUCTED MAY 28, 1976

PRESENT:

FOR THE PEOPLE OF THE STATE OF ILLINOIS:

GERRY L. DONDANVILLE
State's Attorney, By
DONALD C. HUDSON
Assistant State's Attorney

FOR THE DEFENDANT

HERBERT HILL
Attorney at Law

[R-58] THE COURT: This matter comes on for trial. State ready?

MR. HUDSON: State is ready, Your Honor.

THE COURT: You are?

MR. HUDSON: Well, with the exception of one thing. It's come to my attention we cannot get the lab technician, Judge, and I think at this time I'd have to request a continuance under Section 114-4 (c) (2) of the Illinois Revised Statutes, Code of Criminal Procedure. The chemist, Judge, is unavailable. That would be a material witness for the State. I'd have to move for a continuance of this matter for another short date.

MR. HILL: Your Honor, we would object to any continuance at this time. If the State is moving for the continuance based on the fact that the corroborating witness is unavailable with respect to the substance that was analyzed, we would stipulate the substance was heroin.

THE COURT: The motion for continuance is denied, stipulation received.

MR. HUDSON: Let me see if I understand the scope of the stipulation by Counsel.

The six tinfoil packets that Agent Johnson removed from Mr. Ybarra, taken to the lab by him, were [R-59] in fact heroin, and the substance which he then picked up from the lab, assuming we can lay the chain of custody to the lab and back, you would stipulate were in fact heroin?

MR. HILL: That's correct.

THE COURT: That's what the evidence would show if that witness were called to testify?

MR. HUDSON: Yes.

THE COURT: All right.

JEROME JOHNSON,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUDSON:

Q Sir, will you tell us your name and spell it for the Reporter?

A Jerome Johnson, J-o-h-n-s-o-n.

Q What is your business or profession?

A I'm presently employed with the Illinois Bureau of Investigation as a Special Agent.

Q How long have you been employed in that capacity?

A Approximately three and a half years.

Q Okay. Are you presently assigned to any particular [R-60] division of the Illinois Bureau of Investigation?

A Yes, I am.

Q What would that be?

A Joliet Narcotics Division.

Q Calling your attention to March 1st, 1976, aproximately 4:25 on that date were you employed and engaged

in your occupation as a Special Agent for the Illinois Bureau of Investigation?

A Yes, I was.

Q Do you recall where you were located at that time?

A In the area of Aurora, Illinois, precisely the Aurora Tap.

Q Is the Aurora Tap you are speaking of located in Kane County, Illinois, City of Aurora?

A Yes.

Q Do you recall why you were at that location at that time?

A Yes, execute a Search Warrant.

Q And do you recall what type of a place the Aurora Tap was?

A It's a—put it plain, it's a tavern, a lounge.

Q Okay. You were there pursuant to a Search War-' rant?

[R-61] A Correct.

Q And do you recall what particular items or articles you were searching for pursuant to that Search Warrant?

A Heroin and all other narcotic paraphernalia.

Q Were there any other Officers there present at that time to assist in the execution of that Warrant?

A Yes.

Q Do you recall how many there were with you?

A Approximately. There was myself, Special Agent Moraitis, Special Agent Doster, Detective Weaver from the Aurora Police Department, and several other uniformed Officers.

Q Will you tell us, please, what if anything occurred when you arrived at the Aurora Tap on March 1st, 1976 at about 4:25?

A Upon entrance we announced our office, our purpose. We advised all the patrons to remain seated while we conducted an incursive search of all patrons.

Q Approximately how many patrons were inside the tavern at that time?

A This is another approximate guess, approximately twelve to thirteen.

Q And you said all the patrons were searched, [R-62] patted down for weapons, is that correct?

A That's correct.

Q Could you describe the interior of the tavern for us, please, if you recall?

A Well, only words—I can recall just a shabby—just like a hole in the wall, really.

Q Is this more than one room, one room or what?

A One large room, right.

Q What were the lighting conditions inside the room when you entered?

A Poor at best.

Q How many entrances and exits were there?

A One entrance, one exit.

Q Now, where were the individuals located when you entered the tavern?

A Most of the individuals were at the bar either sitting or standing.

Q Would you tell us, please, how the search for weapons was conducted?

A We advised all patrons to put their hands on the bar. We then conducted a pat down search for guns, knives, et cetera, for our own personal safety.

Q Will you tell us, please, what if anything occurred after the pat down search?

[R-63] A I then went back and searched Mr. Ybarra for controlled substances.

Q You searched Mr. Ybarra?

A Yes.

Q Mr. Ybarra you're speaking of, do you see him in court today?

A Yes.

Q Would you point him out, indicate what he's wearing?

A Yes, sitting across the room with a blue jacket, I guess you'd call it a brown shirt, black hair, mustache.

MR. HUDSON: Your Honor, may the record reflect the in-court identification of the Defendant?

THE COURT: May so show.

BY MR. HUDSON:

Q Okay. Now, were Mr. Ybarra's hands visible to you when you first observed him?
A Yes.
Q Was Mr. Ybarra wearing a coat at that time?
A Yes.
Q Would you tell us how you conducted the search of Mr. Ybarra, the second search?
A The second search. He already had his hands on the bar. I started from his neck and patted him down from, [R-64] say, his neck down to his toes.
Q What if anything occurred during the course of that pat down search?
A I felt objects in his pocket which I believed—
MR. HILL: Objection to what he believed, Your Honor.

BY MR. HUDSON:

Q You'll have to testify more specifically.
Where did you feel these objects on his person?
A If my memory serves me correctly they were in his right front pants pocket.
Q What, if anything, did you then do upon feeling these objects?
A I put my hand in his pocket and extracted the substance.
Q What did you extract at that time?
A Six tinfoil packets.
Q Six tinfoil packets. Did you at that time have an occasion to examine the packets or the contents of the packets?
A Not at that particular time.
Q When did you examine the contents of the packets?
A After the place was secure, search was secure, I took the contents back to the Aurora Police Department.
Q What did the packets contain, or what was the [R-65] appearance of the substance in the packets?
A Brown powder.
Q And did you open up all the packets?
A No.

Q How many did you open?
A One.
Q And did that contain the brown powder you're talking of?
A Yes.
Q What, if anything, did you do after you removed the packets from Mr. Ybarra?
A Conducted a field test.
Q Had he been placed under arrest at this time?
A Yes, he had.
Q Where were the packets you took from Mr. Ybarra —Where did you conduct the field test at?
A Aurora Police Department.
Q Where were the packets that you removed from Mr. Ybarra before they went to the Aurora Police Department?
A Where were they?
Q Yes, where were they kept?
A In my possession.
Q And you yourself had exclusive control and custody until they were delivered to the Aurora Police [R-66] Department?
A Solely.
Q Did you conduct the field test yourself?
A Yes.
Q How did you do that?
A By taking a portion of the substance and putting it in a chemical vial which gives off a certain color for opiates, and it reacted positively for heroin.
Q What, if anything, did you do after that with the tinfoil packets?
A Processed the evidence in cellophane bag, initialed it, kept it my briefcase over night and the next morning transported it to the Joilet Bureau of Identification for analysis.
Q Backing up for a second, did you have an occasion to weigh the contents of those tinfoil packets?
A Yes.
Q Do you recall what the weight was?
A Approximately 2.1 grams.

THE COURT: Per packet or total?
THE WITNESS: Total.

BY MR. HUDSON:

Q You say you kept them in your custody over night?
[R-67] A That's correct.
Q And where were they kept?
A In my briefcase.
Q That locked?
A Yes.
Q Where did you keep the briefcase over night?
A In my residence.
Q Did anyone else have access to the briefcase?
A None whatsoever.
Q You had it in your exclusive control and custody?
A Yes.
Q What, if anything, did you do with the cellophane bag and tinfoil packets the next day?
A Delivered to the Bureau in Joliet.
Q What condition was the bag when you delivered it there?
A Sealed.
Q Did you in fact bring the evidence with you?
A Yes, I did.
Q May I see it please?
Will the Court Reporter mark this plastic bag as People's Exhibit No. 1 for identification?

(Exhibit marked as requested.)

BY MR. HUDSON:

[R-68] Q Special Agent Johnson, I'm going to hand you what has been marked as People's Exhibit No. 1 for identification and ask you to examine that and tell me, do you recognize it?
A Yes, it's the same packet that I processed in the Aurora Police Department.
Q Is there any—Are there any particular identifying marks on that packet which cause you to remember that is in fact the same packet?

A Yes, marked on the front you see Exhibit No. 1, case number, my initials, date, and the person who witnessed it.

(Exhibit tendered to Mr. Hill.)

BY MR. HUDSON:

Q Sgt. Johnson, what is the condition of the bag at this time?
A The condition of the bag is sealed.
Q Sealed. Is it in fact in the same condition as it was when you delivered it to the lab on March 2nd?
A No, it's not.
Q What, if anything, is different about that bag?
A For purposes of the analysis they had to open it, and here they have brown tape and some kind of orange sticker. That's the only difference.
[R-69] Q Okay. Other than that then, other than the fact it has a different sticker on it and the initials, is it in fact in the same condition as it was on March 1st when you placed the tinfoil packets into it and in fact sealed this bag closed?
A Yes, it is.
Q Would you open that up, please?
THE COURT: Do you want it opened?
MR. HUDSON: Is it necessary?
MR. HILL: It isn't. We have stipulated to the fact the substance is heroin.
THE COURT: Let the record show then we can admit it.
MR. HILL: I have no objection.
MR. HUDSON: I move, Your Honor, to have the identification marks stricken and the plastic bag and contents admitted as People's Exhibit 1 for identification.
THE COURT: Okay. We'll give leave to the State to withdraw it right back to the Agent. Any objection to that?
MR. HILL: No objection.
MR. HUDSON: No objection. I take it our stipulation covered the chain back to the Court, or do you want me to go into that?

MR. HILL: That's fine. We'd stipulate.
[R-70] MR. HUDSON: Stipulate the proper chain has been preserved?
MR. HILL: Yes.

BY MR. HUDSON:

Q Everything you told the Court occurred in Kane County, Illinois?
A Yes.
MR. HUDSON: I have no further questions, Your Honor.
THE COURT: Cross.

CROSS EXAMINATION

BY MR. HILL:

Q Investigator Johnson, you indicated previously that you had been employed as an Investigator for the Illinois Bureau of Investigation approximately three and a half years, is that correct?
A Correct.
Q During the course of that time did you ever as an Investigator for the Illinois Bureau of Investigation have occasion to come into contact with one Venturn E. Ybarra?
A Yes.
Q Prior to March 1st, 1976?
A No.
[R-71] Q You have never seen him before?
A Correct.
Q And you went to a location in the City of Aurora known as the Aurora Tavern for the purposes of executing a Search Warrant?
A That's correct.
Q And did the Search Warrant indicate what premises were supposed to have been searched pursuant to that Warrant?
A Yes, it did.
Q What did it say?
A Without having the Warrant before me, I believe it's 7900 South LaSalle, the Aurora Tap.

Q And simply described, the premises at 79 South LaSalle, commonly known as the Aurora Tavern?
A Restate your question, I don't understand.
Q Commonly known as the Aurora Tavern?
A Yes.
Q Did it describe the person of any particular individual that you were supposed to search pursuant to that Warrant?
A I believe it did.
Q Do you recall at this time who that individual might have been?
[R-72] A No, I don't.
MR. HILL: May it please the Court, may I see the file for purposes—off the record.
THE COURT: Off the record.

(Whereupon a discussion was had between Court and Counsel off the record, after which the trial in said cause proceeded as follows:)

BY MR. HILL:

Q Would the Court Reporter mark that as Defendant's Exhibit 1 for identification?

(Exhibit marked as requested.)

BY MR. HILL:

Q Investigator Johnson, I show you what has previously been marked as Defendant's Exhibit 1 for identification and ask if you are familiar with that document?
A Well, vaguely, yes. I didn't draw up the Search Warrant or sign it.
Q What does it purport to be?
A A Search Warrant.
Q For what?
MR. HUDSON: Your Honor, I'll object. I think the [R-73] document speaks for itself.
THE COURT: You'd stipulate the document speaks for itself? You'd stipulate that is a copy of the Search Warrant?
MR. HUDSON: Yes.

MR. HILL: Would you prefer to stipulate the document has no relationship, bears no indication of search pursuant to the person of Mr. Ybarra?

MR. HUDSON: No, I'd stipulate the document is a Search Warrant.

THE COURT: And speaks for itself.

MR. HILL: We move it be admitted in evidence as Defendant's Exhibit 1.

THE COURT: No objection?

MR. HUDSON: No objection.

THE COURT: It may be admitted. We'd normally wait for the Defendant's case, but we'll do it now. Identification marks may be stricken.

(Whereupon said exhibit, marked Defendant's Exhibit No. 1, so offered and received in evidence, is made a part hereof:)

* * * *

[R-75] BY MR. HILL:

Q I understand that you arrived at the Aurora Tavern on the 1st of March, 1976 at approximately 4:10 p.m.?

A Approximately.

Q For the purposes of searching those premises?

A Correct.

Q And the person of one Greg who is identified in the Warrant as the bartender?

A If that's what it says, correct.

Q And at the time that you arrived at that location there was approximately twelve to thirteen patrons sitting in the bar?

A Correct.

Q To the best of your knowledge do you know whether or not the Aurora Tavern is a public establishment?

A To the best of my knowledge.

Q Open to the public?

A Right.

Q And invites people in from the street?

MR. HUDSON: Objection, that calls for a conclusion. I think it's a public place, that's all we need.

MR. HILL: Fine.

BY MR. HILL:

[R-76] Q You described the lighting as dim, is that correct?

A Correct.

Q Were you able to observe Mr. Ybarra when you walked into the tavern?

A Yes.

Q Where was Mr. Ybarra when you first entered the tavern?

A He was to my immediate left at the head of the bar.

Q Was he standing at the bar?

A Yes.

Q He was standing there along with other patrons?

A Yes, beside of the patrons. I don't know if he was with 'em.

Q Were you in a position to notice Mr. Ybarra as he was standing next to the other people?

A Was I in a position to what?

Q To observe Mr. Ybarra.

A Not fully. I mean I could see his back, his back was facing me.

Q Were you able to observe his hands?

A No, not really.

Q Were you able to observe his clothing?

[R-77] A Like I say, his back was to me.

Q Do you know what kind of coat or jacket Mr. Ybarra was wearing?

A Yes.

Q What kind of coat or jacket was that?

A It's a three-quarter gray with black stripe lumber type jacket.

Q As you first observed Mr. Ybarra did you notice anything protruding from his coat pocket?

A No.

Q Anything protruding from his pants pocket?

A No.

Q Did you notice anything about his person that would give you the impression of a weapon?

A No.

Q At the time that you observed Mr. Ybarra, did you have any knowledge that Mr. Ybarra had committed any act violative of the Ordinance of the City of Aurora?
A No.
Q At the time that you first observed him, did you notice or did you have knowledge as to whether or not Mr. Ybarra committed any act violative of the Statutes of the State of Illinois?
A I had no such knowledge.
[R-78] Q At the time you observed him did you notice that he had committed any act violative of any Federal Statute?
A No.
Q To the best of your knowledge he had done nothing wrong?
A Correct.
Q And thereafter you submitted Mr. Ybarra to a search?
A Yes.
Q I understand from your prior testimony this search was a cursory search for weapons?
A Correct.
Q Did you find any weapon upon the person of Mr. Ybarra?
A No, I did not.
Q And thereafter you continued to search other patrons?
A Correct.
Q Was Mr. Ybarra in your view at that time?
A At what time?
Q At the time you were searching the other patrons?
A No.
Q Did you at any time observe Mr. Ybarra attempt [R-79] to do anything with his hands, hide anything?
A I didn't, no.
Q Did you see Mr. Ybarra move toward any of the other patrons?
A No.
Q Did you at any time observe him move from the location where he was?
A No.

Q How long did it take for you to search the other patrons?
A Again, approximately maybe ten minutes.
Q And within that time Mr. Ybarra was in your view?
A No.
Q He was not in your view?
A No.
Q You returned to search Mr. Ybarra again?
A Correct.
Q Did you observe a weapon on him at that time?
A No.
Q Did you have any knowledge that he committed an offense at that time—
A No.
Q (continuing)—of either a State, local or [R-80] Federal Statute?
A No, I didn't.
Q And you submitted him to a search again?
A Correct.
Q For weapons?
A No.
Q Did you have any knowledge that he had anything upon his person that was violative of any Statute?
A No.
Q And after this search did you submit Mr. Ybarra to a third search?
A No.
Q You only searched Mr. Ybarra twice?
A Correct.
Q Did you search any of the other patrons in the establishment a second time?
A I personally? No.
Q You mentioned, Investigator Johnson, that the establishment was a fairly small room—or large room, which one was it?
A Large.
Q Large room. And there was one entrance and one exit?
A Correct.

[R-81] Q Was there any one of the Officers with you standing in front of that exit?
A Yes.
Q So none of the patrons were permitted to leave?
A Not after they had been searched, no.
Q Prior to the time they were searched was there anyone standing in front of the door?
A Yes.
Q Prohibiting anybody from leaving?
A Leaving or entering.
Q Prior to the time that you searched Mr. Ybarra the first time did you tell him at that point he was under arrest?
A No.
Q Prior to the time he was searched on the second occasion did you indicate to him that he was under arrest?
A No.
Q And you had no knowledge that he committed any offense?
A Correct.
Q Even following your first search?
A Correct.
Q I take it upon the second search you recovered certain materials from his pocket?
[R-82] A That's correct.
MR. HILL: I have no further questions.
MR. HUDSON: Just a couple, Judge.

REDIRECT EXAMINATION

BY MR. HUDSON:

Q Special Agent Johnson, on the occasion of the second search did you pat Mr. Ybarra down first before you felt these objects?
A Oh, yes.
Q You didn't go right into his pocket, is that correct?
A Correct.

Q Did you have him in your constant visual observation between the time of the first search and the time of the second search?
A No.
MR. HUDSON: I have no other questions.
MR. HILL: No questions, Your Honor.
THE COURT: Okay. Does the State have any other witnesses?
MR. HUDSON: No, Your Honor.
THE COURT: You rest?
MR. HUDSON: State rests.
MR. HILL: Defense rests, Your Honor—oh, no, I'd [R-83] like to put Mr. Ybarra on.

VENTURA E. YBARRA,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HILL:

Q Would you state your name and spell your last name for the Court Reporter, please?
A Ventura E. Ybarra, Y-b-a-r-r-a.
Q Mr. Ybarra, did you have occasion to be at or near the Aurora Tavern on or about the first day of March, 1976 at approximately 4:10 p.m.?
A Yes?
Q At that occasion did you have occasion to submit or—strike that. Did you have occasion to be searched while you were there?
A Yes, I was.
Q Are you familiar with the Aurora Tavern?
A Yes.
Q Is that a public or private place, Mr. Ybarra?
A It's public.
Q And you were there along with other patrons?
A Yes.

[R-84] Q There was no private setting going on?
A No.
Q You were standing at the bar when the police came in?
A Yes.
Q Did anyone at any time tell you that you were under arrest prior to searching your person?
A No.
Q How many times were you searched?
A Three times.
Q Do you recall what Officer, if any of them, searched you?
A Yes.
Q Which one?
A This one. (Indicating.)
MR. HILL: Let the record reflect the witness refers to Investigator Johnson.
THE COURT: It may so indicate.

BY MR. HILL:

Q The first time that you were approached by Mr. Johnson, what, if anything, did he say to you?
A He just told me put my hands up on the bar, keep looking straight ahead, and just searched me.
Q Did you move in any direction toward Mr. Johnson [R-85] prior to him searching you?
A No.
Q Did you have any weapons about yourself?
A No.
Q Did you point any weapons in his direction?
A No.
Q Were you carrying a gun or knife?
A No.
Q Did you make any noises prior to the time he searched you?
A No.
Q And you submitted to that search, is that correct?
A Yes.
Q He searched you, is that right?
A Right.

Q And did he find anything upon searching you the first time?
A No.
Q And what, if anything, did you do after that?
A What did he do?
Q What did you do?
A Nothing. He told me to keep my hands on the bar, keep looking straight—
[R-86] Q And did you keep your hands on the bar?
A Yes.
Q Did you at any time remove your hands from the bar?
A No.
Q Did you touch any of the other patrons that were near you?
A No.
Q Did you touch any of the police officers?
A No.
Q Did you go toward any of them?
A No.
Q Did you move in any way from where you were standing?
A No.
Q And approximately ten minutes later Investigator Johnson came back to search you again, is that correct?
A Right.
Q And what happened with respect to that search?
A Well, he searched me several times. First time he searched me, he came back, checked my boots, left again, he came back and he gave me another search.
Q And the second time he came back to search you he requested that you take off your shoes?
[R-87] A No, just pulled my bells and rubbed his fingers around my boots.
Q Did he find anything around your boots or pants?
A No.
Q He left at that time, is that correct?
A Yes.
Q Did he search any other patrons following that second search?
A Yes.

Q And he returned to you again, is that correct?
A Yes.
Q Did you move from your position where you were standing following the second search?
A No, because he had told another officer to keep an eye on me.
Q Did you move your hands from the position of the bar where they were?
A No.
Q Were your hands flat on the bar?
A Yes.
Q They were not under the bar hiding anything?
A No.
Q Did you have anything in your hands at that time?
[R-88] A No.
Q And subsequently Mr. Johnson came back and searched you a third time?
A Correct.
Q How did he search you then?
A He patted me down. He was patting my pocket and then went into my pockets.
Q And he removed then certain items?
A Yes.
MR. HILL: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. HUDSON:

Q Mr. Ybarra, when you say he searched you the first time, do you mean he patted you down or searched your pockets?
A He patted me down.
Q Then when he came back and patted you down a second time he did pat you down first before he went in your pockets?
A Yes.
Q And then he removed six tinfoil packets from your person, is that correct?
A Yes.

[R-89] MR. HUDSON: I have no other questions, Judge.
MR. HILL: No further questions. Defense rests, Your Honor.
THE COURT: Okay. Any statements for the record?
MR. HUDSON: Judge, I'd make a brief closing argument.
I think the evidence has certainly shown here beyond a reasonable doubt Mr. Ybarra did in fact possess six tinfoil packets which contained substance in the amount of 2.1 grams of heroin.
I think any questions as to the scope or legality of the search were properly ruled on by the Court in a motion to suppress.
I think the evidence certainly sustains he's guilty of possession, unlawful possession of a controlled substance, that being heroin.
MR. HILL: In response, Your Honor, I'd like to offer and reiterate on behalf of this Defendant our motion to dismiss this matter and to dismiss the matter based on the fact that the search conducted of the person of Mr. Ybarra was unconstitutional and in violation of the Fourth Amendment, against unreasonable search, and I would submit to the Court in support of that motion the case of People vs. Hering, 318 N.E. 2d 575—strike that, 757, in which the Court indicated that a search conducted [R-90] without a Warrant is per se unreasonable and subject only—or per se unreasonable subject only to a few specifically established exceptions, those exceptions are established or primarily well defined exceptions and all within the area of a frisk based on probable cause that either a crime had been committed, that a crime was being committed or that a crime was about to be committed.
I think the testimony that has come from Investigator Johnson with respect to Mr. Ybarra's presence at the Aurora Tavern or his knowledge of Mr. Ybarra prior to going to the Aurora Tavern seems to suggest that Mr. Ybarra had done nothing that was violative of any statute or ordinance or Federal statute showing that he had

committed any crime, or was about to commit any crime, or that any crime had been committed by Mr. Ybarra.

I'd like to direct the Court's attention to the fact that while Investigator Johnson was at the Aurora Tavern pursuant to the issuance of a Search Warrant, which was not contested within this matter, the Warrant specifically described the premises at 79 South LaSale Street within the City of Aurora. Those premises, as far as the evidence reflects, represents a public establishment open to the public and inviting people in generally. It also related to the search of a particular person described [R-91] in the Search Warrant as being Greg. I do not believe that under those circumstances the Investigators from the Illinois Bureau of Investigation, the Aurora Police Department, or any other law enforcement agency as far as that goes, would have the carte blanche authority to go into such an establishment and for the purposes of conducting a generalized search submit all of the patrons that are there to an intrusion upon their privacy, and I think that is exactly what Investigator Johnson has testified to.

He has suggested that Mr. Ybarra did nothing wrong, was not in violation of any statute or ordinance, et cetera, and that his first search reflected the fact that there were no weapons upon him.

Now, the cases as far as search and seizure are concerned suggest that if there is to be a frisk, and I submit to the Court that this particular situation falls within the area of a frisk pursuant to People vs. Felton, 318 N.E. 2d 642 (20 Ill. App. 3d 103), in that even though a Warrant had been obtained, the Felton case suggests that in the absence of a showing of probable cause to search the principles limiting the search under stop and frisk are controlling in that particular kind of situation.

I don't believe there's any need to reiterate [R-92] the fact there is no probable cause here, and pursuant to Felton this kind of situation is limited to a stop and frisk.

In Felton the Court held that three restrictions are placed on the right of policemen to stop and frisk individuals suspected of criminal acts, and I point out to the Court this is with respect to people who are suspected of criminal acts. Here we have a Defendant who is not even suspected.

First, the Court says the stop itself must be reasonably—must be justified by specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the intrusion. Our testimony with respect to Investigator Johnson discards anything articulable about the search with Mr. Ybarra.

Secondly, assuming a valid stop, a limited search of the suspect for weapons is justified only if a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. There was no testimony with respect to any danger imminating to Mr. Johnson. He testified he found no weapons on him. He testified that the apparel which Mr. Ybarra was clothed in at that particular time made no suggestion of any weapons about his person or [R-93] that there was any in any close proximity to him.

Thirdly, an authorized search is confined in scope to an intrusion reasonably designed to discover objects capable of use as weapons.

Now, Investigator Johnson indicated he found no weapon, and yet after ceasing the initial search he goes about his business to search other patrons perhaps on a theory of a cursory search for weapons as he testifies, and he subsequently comes back and he submits Mr. Ybarra to another pat down, which at this point we maintain is certainly a most unreasonable search and certainly violative of the Fourth Amendments rights to have this Defendant's right to protection under the Fourth Amendment.

Furthermore, Felton held that a search—

THE COURT: Didn't you mention this case in the Motion to Suppress?

MR. HILL: I did. I'm simply reiterating.

THE COURT: Can't you leave your argument there stand for your arguments now, or do you feel to protect your record you have to read it all in?

MR. HILL: I would feel I should.

THE COURT: Okay. Go ahead.

MR. HILL: The Court held that a search may not precede an arrest and serve as part of its justification, [R-94] or even looks, gestures, movements taken alone are insufficient to constitute probable cause to search since they in fact may be consistent with innocence. It is only when the furtive gestures are coupled with other circumstances tending to show probable cause that the suspicious movement will be included in the basis for finding probable cause for a search.

But we have no indication in this record at all indicative of any kind of movements, gestures or otherwise that would suggest that Investigator Johnson should have pursued the second, and as Mr. Ybarra testifies, to yet a third intrusion upon his privacy without probable cause and without any basis to assume that Mr. Ybarra committed an offense.

We think, Your Honor, that People vs. Felton and People vs. Harshbarger, 321 N.E. 2d 183, and People vs. Ortiz, 16 Ill. App. 3d are controlling in this situation, and that the Court should not allow a judgment to be entered affecting the rights of Mr. Ybarra as a result of evidence obtained pursuant to an illegal search.

MR. HUDSON: A couple brief comments.

Mr. Hill said nothing. At this stage we have had a trial as to the guilt or innocence of the Defendant. Once again I submit the evidence clearly established his [R-95] guilt of the offense charged.

The arguments which I presented at the Motion to Suppress I would rely on again at this time, but I would merely reiterate for the record the two cases which I presented to the Court at that time for its consideration which are dispositive of the legality of this type of search pursuant to a Search Warrant, that would be People vs. Pugh, cited at 217 N.E. 2d 557, a 1966 case out of the First District, and also People vs. Kielczynski, 264 N.E. 2d 767, a 1970 case out of the First District. I believe those cases are dispositive as to the legality of the search.

THE COURT: All right. In regard to the motion, first of all, if that in effect is a reiteration of the motion, I do not agree as a matter of fact that there is no probable cause to search the Defendant consistent with those cases that you just cited. Certainly to say that there was no probable cause would be a conclusion, and that would have to stand on the facts in the case and not what any agent thought or what anyone thought it would be what the facts were, and in line with those cases that it is reasonable to search people in that situation, I never intended to make a finding there was not probable cause to search, but still I have to limit [R-96] it between the framework of the cases the State cited. Motion denied, finding will be guilty.

This is a second class—

MR. HUDSON: This would be a third class, Judge, it's under 30 grams.

THE COURT: Third class. He has a right to apply for probation. He has a right to a hearing in aggravation-mitigation. I take it you wish to avail yourself of those rights, Mr. Hill?

MR. HILL: Yes, we do, Your Honor.

THE COURT: So, let's set that for Friday, June 25th. Is that a good date?

MR. HILL: In the afternoon?

THE COURT: Then the hearing in aggravation-mitigation and application for probation will be June—what did I say, June 25th?

MR. HILL: Yes.

THE COURT: And any post trial motions that are then pending.

MR. HILL: All right.

MR. HUDSON: Is that 9:30?

THE COURT: Yes.

(Which were all the proceedings had at the hearing in said cause.)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

No. 76-CF-9101

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

v.

VENTURA E. YBARRA, DEFENDANT

ORDER

ENTERED MAY 28, 1976

This matter having come on for trial, the defendant having waived his right to a trial by jury and consenting to a bench trial, the Court having heard all of the evidence presented, and the arguments of counsel, the Court finding the defendant guilty of the Unlawful Possession of a Controlled Substance as charged in the indictment:

It is hereby ordered that:

June 25, 1976 at 11:00 a.m. is hereby set for a hearing in aggravation and mitigation; return of pre-sentence investigation and the defendant's application for probation and for sentencing.

/s/ _____
JOHN A. KRAUSE
Judge

Enter this 28th day of May, 1976

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

POST-TRIAL MOTION

FILED JUNE 28, 1976

[CAPTION OMITTED IN PRINTING]

NOW COMES defendant, Ventura A. Ybarra, by Herbert Hill, his attorney, and moves the Court for the entry of an Order reversing and setting aside its prior finding of defendant's guilt, or in the alternative, allow said defendant a new trial, and as grounds therefore, alleges and states as follows:

(1) That certain evidence herein was improperly admitted, and that said evidence should have been suppressed;

(2) That it was error to deny defendant's Motion to Suppress said evidence.

WHEREFORE, defendant, Ventura E. Ybarra, prays that said judgment be reversed and set aside, or in the alternative that defendant be granted a new trial.

Respectfully submitted,

/s/ Herbert Hill
Attorney for Defendant

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

HEARING ON POST-TRIAL MOTION
AND ON SENTENCING

TRANSCRIPT OF PROCEEDINGS

CONDUCTED JUNE 28, 1976

PRESENT: FOR THE PEOPLE OF THE
STATE OF ILLINOIS:

GERRY L. DONDANVILLE
STATE'S ATTORNEY, BY

DONALD C. HUDSON
ASSISTANT STATE'S ATTORNEY

FOR THE DEFENDANT

HERBERT HILL
ATTORNEY AT LAW

[R-100] MR. HUDSON: Your Honor, coming before the Court now in case No. 76 CF 9101 is entitled The People vs. Ventura E. Ybarra, Y-b-a-r-r-a. In this cause the Defendant was indicted on a single Count Indictment charging the Defendant with unlawful possession of a controlled substance, that being heroin, in an amount less than 30 grams, being a Class Three Felony.

Let the record reflect in this cause that on May 6, 1976, the Defendant filed a motion to suppress physical evidence. That motion was denied and matter continued to May 28th for trial. On that date a trial was held, bench trial, and the Defendant was found guilty of the offense as charged.

The matter came on this morning set for sentencing. The record should reflect Mr. Ybarra is present before the Court represented by Mr. Hill. Mr. Hill just filed, apparently, I have just seen, a Post Trial Motion asking

the Court to reconsider its finding of guilty, and that it was error to deny the Defendant's Motion to Suppress evidence.

I have not had a chance to consider this motion, but I think I would waive prior notice. I'd be prepared to argue any grounds at this time.

THE COURT: Do you want to proceed on the Motion?

[R-101] MR. HILL: Your Honor, in light of the fact that the Motion has been raised prior to trial and again at the trial level, the Defendant would respectfully waive any argument and simply stand—

THE COURT: Stand on the former arguments?

MR. HILL: Yes.

THE COURT: All right. The Motion will be denied.

MR. HUDSON: Judge, as regards the sentencing in this case, the Probation Department has returned a presentence investigation, which I believe the Court has had the opportunity to consider, recommending probation. The position of the State is while we do not feel that's an inappropriate recommendation, if the Court would see fit to grant probation we'd ask it be a formal reporting probation in which the Defendant would be required as a condition to continue his treatment in the Aurora Drug Area Abuse Program.

The Defendant is eligible for 1410, but because of the fact he's undergoing treatment we think it would be best for himself as well as the interest of justice if the probation is granted but the Court require him to report and continue his treatment.

MR. HILL: Your Honor, the defense would obviously concur in the recommendation of the State with respect to [R-102] the probation. However, if the Court should see fit to grant this Defendant probation I'd like the Court to consider the fact that he's now currently under a drug rehabilitation program of the City of Chicago, and if the Court should require that he make some kind of formal reporting to the Court that it do so at an interval that would not obstruct the other program.

I understand from the people there it's kind of diffi-

cult to get him back and forth from Cook into Kane County for appointments here.

THE COURT: Where does he have to go for the program?

THE DEFENDANT: Chicago.

THE COURT: Safari House?

THE DEFENDANT: Right.

MR. HILL: It's kind of a live-in arrangement?

THE DEFENDANT: Right.

THE COURT: I would think if he would mail his report and the Probation Officer could call in there once and awhile and talk to him on the phone at Safari House and talk to the people there that would be enough control.

How long will this program go on at Safari House?

MR. HILL: I think it's a nine month program, isn't it?

[R-103] THE DEFENDANT: It's volunteer. I volunteer. I volunteered.

THE COURT: You don't know how long it is?

THE DEFENDANT: No.

THE COURT: Are you on methadone now?

THE DEFENDANT: Yes.

THE COURT: They try to get you away from that over a period of time?

THE DEFENDANT: Yes.

THE COURT: Until you don't need anything?

THE DEFENDANT: Right.

THE COURT: Is that your goal, is that what you want to do?

THE DEFENDANT: Yes.

MR. HILL: I think, Your Honor, from my understanding and talking with Miss Erma Cunningham, who is involved in that program, that even though it might be of a voluntary nature once there is an admission into the program the person has to stay for at least a six to nine month period, and I think Mr. Ybarra has been there since April?

THE DEFENDANT: April 3rd.

MR. HUDSON: I'd require it be a mandatory condition that he not—that he be required to participate in the program and complete it rather than having a

voluntary status, if he wants to go, fine, if he doesn't, he doesn't. [R-104] I think it should be a specific condition of probation if it's granted.

THE COURT: What else do you do while you're there in Safari House?

THE DEFENDANT: Well, this morning like therapy orientation type thing.

THE COURT: Can you finish—get your G.E.D. while you're there?

THE DEFENDANT: Yes.

THE COURT: Are you going to work on that?

THE DEFENDANT: Well, I was working, see if I could get a job more before I go into that because I got financial problems at home. They'll allow you to have a certain period of time to go out and look for a job.

THE COURT: Does anyone else have anything else to say?

MR. HILL: No, Your Honor.

THE COURT: All right. Based on the probation report which everybody's had a chance to look at and consider, and pursuant to the finding of guilty after a trial stemming from a Indictment was it?

MR. HUDSON: Yes.

THE COURT: (continuing)—the Court will sentence the Defendant to a period of two years probation, that he [R-105] stay enrolled in the drug rehabilitation program.

Now, I take it that if they want to transfer him somewhere but he's still under the drug abuse program that's all right. Is Miss Cunningham who you work with?

THE DEFENDANT: Yes.

THE COURT: I'm not saying Safari House, but wherever they put him as long as he's enrolled in the program.

MR. HILL: So that if it becomes possible that he move to Texas where the remaining portion of his family is—

THE COURT: He can transfer his probation.

MR. HILL: To anywhere as long as there's a program?

THE COURT: As long as there's a program he can be involved in until some program official represents to the Court that he's cured.

MR. HILL: Fine. Is that with periodic reports from the Program Director?

THE COURT: Periodic reports from the Defendant and the Probation Office may make its arrangements with the Program Director as to how they stay in contact. I want the Probation Department to stay in contact with the Program Director. Whether they initiate it or the Program Director initiates it they can work that out.

Then payment of costs. Does he have a bond up?

[R-106] MR. HILL: No.

THE COURT: During the term of the probation. That's what you want to do, Mr. Ybarra, is that correct?

THE DEFENDANT: Yes.

THE COURT: Because if you don't want to do this program then it's not going to do any good.

THE DEFENDANT: The thing is like more—I'd like to leave back to Texas, as I have family down there.

THE COURT: You have to get the Texas authorities to take you, see what I mean?

THE DEFENDANT: Yes.

THE COURT: Then you've got to make arrangements to get in a drug abuse program that we can keep track that you follow through on this, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Then you also understand, of course, that your conviction could be appealed within 30 days, you ask the Clerk of the Court to file a Notice of Appeal, or your attorney. If you don't have funds the Court will appoint an attorney for you, and if you're without funds the Court will make available a record of this and all the other proceedings without costs to you. Do you understand those rights?

THE DEFENDANT: No, Your Honor.

[R-107] THE COURT: Mr. Hill, do you want to talk to him?

MR. HILL: Yes, Your Honor. It's his intention to appeal, and he does not have funds to employ private Counsel for that purpose and would ask the Court at this time to appoint the Office of the Appellate Public Defender to represent him in this appeal.

THE COURT: Mr. Ybarra, you're not employed at this time, is that correct?

THE DEFENDANT: No.

THE COURT: You have no bank account?

THE DEFENDANT: No.

THE COURT: And you have no savings?

THE DEFENDANT: No.

THE COURT: Do you own a car?

THE DEFENDANT: No.

THE COURT: So essentially what you own are the clothes on your back and a few personal items, right?

THE DEFENDANT: Right.

THE COURT: Let the record show the Court finds he's a proper subject for the Appellate Defender. And who will notify the Appellate Defender?

MR. HILL: I will.

THE COURT: All right.

MR. HUDSON: I'll draw an order to that effect.

[R-108] THE COURT: So you understand now we are appointing the Appellate Defender to take an appeal for you from this case, you understand that?

THE DEFENDANT: Yes.

THE COURT: And due to the fact you're indigent, or you don't have any money, this is all going to be done for you, you don't need any more money, do you understand that?

THE DEFENDANT: All right.

(Which were all of the proceedings had at the hearing in said cause.)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

No. 76-CF-9101

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

v.

VENTURA E. YBARRA, DEFENDANT

JUDGMENT ORDER

ENTERED JUNE 28, 1976

[CAPTION OMITTED IN PRINTING]

This case comes on to be heard for sentencing. Defendant is present in person and by counsel. The Court has considered the pre-sentence investigation report filed herein, together with the evidence and arguments. The Defendant has been allowed an opportunity to make a statement in his behalf.

The above-named defendant has been heretofore adjudicated Guilty of the Crime of Unlawful Possession of a Controlled Substance, a Class 3 Felony.

IT IS ORDERED:

1. That the defendant's application for probation or conditional discharge is allowed, and

Defendant is sentenced to probation under the supervision of the Probation Officer for a term of 24 months, comencing this date.

* * * *

/s/ _____
JOHN A. KRAUSE
Judge

Enter this 28th day of June, 1976

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

No. 76-483

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

—*vs.*—

VENTURA YBARRA, DEFENDANT-APPELLANT

Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

OPINION

FILED FEBRUARY 9, 1978

Mr. JUSTICE GUILD delivered the opinion of the court:

Defendant Ventura E. Ybarra, in a bench trial, was found guilty of unlawful possession of a controlled substance and sentenced to two years probation under the condition that he continue with his treatment under the Drug Abuse Program. Pursuant to leave granted, the Illinois State Police, Department of Law Enforcement, has filed an amicus curiae brief herein.

The sole question presented is whether the search of the patrons of a bar was in violation of the Fourth Amendment.

On March 1, 1976, agents of the Illinois Bureau of Investigation, together with police officers from the city of Aurora, pursuant to a search warrant, went to the Aurora Tap seeking "evidence of the offense of possession of a controlled substance to be seized therefrom: heroin, contraband and other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture processing and distribution of controlled substances." When the officers arrived at the Aurora Tap, described as a dismal, drab and shabby type establish-

ment consisting of one room, there were 12 patrons present. The premises were searched, as well as the patrons. In the first patdown of the defendant at the bar a cigarette package with objects in it was felt by the officer. Within a few minutes the officer again searched the person of the defendant and found six tinfoil packs of heroin.

No objection is made to the warrant itself. The issue raised by the defendant is that, in the execution of such warrant, the persons in a public place such as this may not be searched. The defendant argues that the heroin found upon his person was the fruit of an illegal search since he was not named in the warrant and was in a public place and, therefore, it was erroneously admitted into evidence. The motion to suppress this evidence was made prior to trial and denied. The authority for the search herein is found is section 108-9 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1975, ch. 38, par. 108-9), which reads as follows:

> "In the execution of the warrant the person executing the same may reasonably detain the search any person in the place at the time:
>
> (a) To protect himself from attack, or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

In substance, the defendant contends the provision of this statute providing that the person executing the warrant may search any person in the place at the time to prevent the disposal of articles or things described in the warrant is a violation of the Fourth Amendment. A similar statute is found in Arizona, Kansas, Georgia and the District of Columbia.

In support of his position, defendant has cited *United States* v. *Di Re* (1948), 332 U.S. 581, 587, 92 L.Ed. 210, 216, 68 S. Ct. 222, 225. We do not find that case applicable to the situation before us. The police officers in this case located, in an automobile, a party previously named by an informant, who allegedly had counterfeit

gas coupons. The defendant Di Re was a passenger in the vehicle and was searched and convicted upon the evidence seized from his person. The court in *Di Re* held that the warrantless arrest and search of defendant's person when he had committed no offense and was merely present in the vehicle was not justified. This case, involving a warrantless search of an automobile passenger, has no real bearing upon the proper application of section 108-9, which deals only with situations involving warrants. Defendant also has cited *Stanford* v. *Texas* (1965), 379 U.S. 476, 13 L. Ed. 2d 431, 85 S. Ct. 506. In *Stanford* the court considered a "general warrant" which the federal courts have repeatedly held to be invalid under the Fourth Amendment. In *Stanford* the officers went to the defendant's residence and seized about half of all the books in his house and all of his personal papers, 14 cartons in all. The court held, and rightly so, that no official of the State shall ransack a person's house and seize his books and papers under the unbridled authority of a general warrant. That is not the situation in the case before us as the officers here were conducting a search in a small bar or saloon under a specific warrant for the discovery of heroin and allied paraphernalia.

The defendant has also cited *State* v. *Mendez* (1977), 115 Ariz. 367, 565 P.2d 873, which involved a statute virtually identical to ours. Defendant, who was not named in the search warrant, and not linked to the premises being searched, entered while the search was in progress. The subsequent search of his person, which revealed heroin, was found to be unreasonable. Our case is different because defendant was present when the police first arrived and thus had an opportunity to acquire or conceal the contraband, which police were searching for, upon his person.

In further support of defendant's position, counsel has cited *Willis* v. *State* (1970), 122 Ga. App. 455, 177 S.E. 2d 487, which involved a Georgia statute analogous to the Illinois statute. Defendant argues the Georgia courts do not allow the persons of those present to be searched, pursuant to a warrant for the premises, but that other

facts and circumstances making it likely that the items are being concealed by them must be present to justify the search of their persons. In *Willis* the peace officers had a search warrant for an apartemnt and, in executing the same, the court held that any person present who might reasonably be involved in the crime of possession of illegal drugs was the proper subject of the execution of the warrant. The court observed that the drugs were pills in a small container which might easily be passed from person to person. The court there stated, "we hold the search not unreasonable under Fourth Amendment standards, and authorized by the terms of the warrant." (122 Ga. App. 458-59, 177 S.E.2d 487, 489). The court's further general observation was that such a warrant would not authorize the search of someone in another part of the house; or the search of a person entering the premises such as a postman; or the search where there was no reason to believe the house was being frequented by persons illegally purchasing drugs. The latter is particularly interesting because in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs. We find *Willis* is actually supportive of the search of the defendant herein.

In this connection the observations of the Supreme Court of Washington, in *Olympia* v. *Culp* (1925), 136 Wash. 374, 377, 240 P. 360, 361-62, are pertinent.

> "Officers making a search of premises under a search warrant may lawfully detain all persons found therein until the search is concluded. Any other rule would frustrate the purposes of the search; the officers would be compelled to stand idly by while the articles for which the search was instituted were carried away. The law is not so impotent as this. The officers may, under a warrant to search the premises, lawfully search any one found therein whom they have reasonable cause to believe has the articles for which the search is instituted upon his person."

Defendant further relies on the recent case of *People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363 N.E.2d 62. In that case, the police officers were executing a search warrant of premises located on the south side of Chicago when the defendant knocked at the door and entered the apartment. An officer noticed a bulge under the defendant's coat and he was thereupon searched. That search disclosed a gun. The substance of the *Dukes* case is summed up in the court's statement that interpretation of section 108-9 of the Code of Criminal Procedure:

> "* * * in a manner permitting police officers to search anybody who happens upon premises described in the warrant during the execution of the warrant, would be to give the statute an unacceptably overbroad interpretation." (48 Ill. App. 3d 237, 241, 363 N.E.2d 62, 64.)

The court found that section 108-9 of the Code of Criminal Procedure did not authorize the search of persons,

> "* * * on the premises described in the warrant without some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." (48 Ill. App. 3d 237, 241, 363 N.E.2d 62, 64.)

The latter phrase is controlling in the case before us. There is no doubt that the six packets of heroin herein could easily be concealed by the defendant and thus thwart the purpose of the warrant authorizing the search for heroin in the premises in question, nor do we find that the defendant was an "innocent stranger(s) having no connection with the premises" as stated in *Dukes*.

Examination of *People* v. *Pugh* (1969), 69 Ill.2d 312, 217 N.E.2d 557, discloses a case quite similar to *Dukes*. In *Dukes*, of course, the officers were conducting a search or executing a search warrant for the discovery of gambling paraphernalia while in *Pugh* the subject of the search under the warrant was for narcotics. Probably the distinguishing feature between *Pugh* and *Dukes* is that Dukes, in entering the gambling premises, was

merely a visitor, while in *Pugh* the warrant was being executed on the premises and the person of Jessie Pugh when Raymond Pugh entered. While the case does not state that Raymond Pugh was a resident of the premises, the sole issue raised in the case by Raymond Pugh was as to the search of his person. In that respect the appellate court stated, in interpreting section 108-9 of the Code of Criminal Procedure:

> "We agree with the State that the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all the persons on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the defendant onto the premises where the police have reason to believe narcotics are concealed provides further grounds for his search. The United States Constitution prohibits unreasonable searches (U.S. Const. amend. IV); the search of Raymond Pugh under the circumstances of this case cannot be so classified." 69 Ill. App. 2d 312, 316, 217 N.E.2d 557, 559.

In this connection the comments of Illinois Revision Committee are pertinent, *viz.*,

> "In addition, it is clear that the purpose of the warrant would be thwarted were not the officer given the second power found in subsection (b), *i.e.* to search the person for the things to be seized. The need for this power arises most often in the narcotics cases where disposition is most easily effected.
>
> * * * *
>
> The committee felt that this section is necessary because it gives the officer a clear outline of his power in executing the warrant and removes doubt from a rather cloudy area of the law." Ill. Ann. Stat., ch. 38, par. 108-9, Committee Comments, at 271 (Smith-Hurd 1970).

We reiterate that each case must be decided upon the facts found therein. Such a warrant obviously would not

authorize a "blanket search" of persons or patrons found in a large retail or commercial establishment. But in the case before us the search was conducted in a one-room bar where it is obvious from the complaint of the officer seeking the search warrant that heroin was being sold or dispensed.

In *People* v. *Kielczynski* (1970), 130 Ill. App. 2d 231, 264 N.E.2d 767, we find again a case of a search warrant being issued for the search of the premises only for gambling equipment. Kielczynski owned the premises which was a gas station and in the execution of the search warrant the defendant's person was searched. Defendant's contention was that the trial court erred in denying his motion to quash the warrant and suppress the evidence. The appellate court, in considering section 108-9 of the Code of Criminal Procedure found that searches of persons on the premises have been found to be reasonable, citing *People* v. *Harrison* (1967), 83 Ill. App. 2d 90, 226 N.E. 2d 418, and *People* v. *Pugh*. The court stated,

> "We conclude that the search of defendant's person, who was on the premises described in the instant search warrant, was reasonable and necessary for the execution of the warrant." 130 Ill. App. 2d 231, 238, 264 N.E.2d 767, 771.

The Supreme Court of Kansas, in *Kansas* v. *Loudermilk* (1972), 208 Kan. 893, 494 P.2d 1174, considered the statute of Kansas which was adopted from section 108-9 of the Illinois Code of Criminal Procedure verbatim, except for the deletion of the words "any instruments, articles or" found in section (b) of the Illinois statute. In the execution of a warrant, three parties were present and Loudermilk, the defendant, was searched. In the wallet of Loudermilk heroin was found. The Kansas Supreme Court found that in the execution of a search warrant under the Kansas statute the reasonable detention and search of a person found on the premises does not offend against the Fourth Amendment. The court further found that the Fourth Amendment prohibits only unreasonable searches and seizures and that the search

conducted in *Loudermilk* was not unreasonable. The court further found that the case of *Sibron* v. *New York* (1968), 392 U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (also cited by the defendant herein), dealing with a warrantless search was not applicable to the search warrant execution situation before it. The court in *Loudermilk* concluded:

> "Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable, but necessary to secure effective enforcement of the Uniform Narcotic Drug Act." (208 Kan. 893, 898, 494 P.2d 1174, 1178).

See also *Kansas* v. *McClelland* (1974), 215 Kan. 81, 523 P.2d 357.

Probably the most closely akin case to the one before us is found in *United States* v. *Graves* (D.C. App. 1974), 315 A.2d 559. The District of Columbia code is most similar to section 108-9 of the Illinois Code of Criminal Procedure, reading, that an officer executing a warrant for the search of premises, or a vehicle, may search any person therein,

> "* * * to the extent reasonably necessary to find property enumerated in the warrant which may be concealed upon the person * * *" (315 A.2d 559, 560.)

In *Graves* the warrant was for the search of a delicatessen, seeking gambling paraphernalia. In the execution of the warrant there were five or six persons in the delicatessen. The patrons were searched and gambling paraphernalia was found on the person of the defendants Graves and Goldston. The court there relied upon the prior decision of the District of Columbia Court of Appeals in *United States* v. *Miller* (D.C. App. 1972), 298 A.2d 34, and held:

> "* * * the officers had sufficient grounds to search the few individuals present when the warrant was executed." (315 A.2d 559, 561.)

The District of Columbia Court of Appeals noted that such a warrant would not "authorize the search of a large number of persons present in a supermarket or other such store when there was no reason to link them to the objects of the search." (315 A.2d 559, 561). On the evidence before it, the court found:

> "We do not believe on these facts that a suspect should be allowed to circumvent a warrant to search premises by the simple device of picking up the illegal object and holding it in his hand or placing it in his sock." (315 A.2d 559, 561.)

The court concluded the officers acted reasonably in searching the five or six patrons who were found in the delicatessen.

In summation, we do not find section 108-9 of the Illinois Code of Criminal Procedure to be unconstitutional in its application to the facts before us. We therefore affirm the judgment of the conviction of the defendant herein.

Affirmed.

WOODWARD and RECHENMACHER, JJ., concur.

IN THE APPELLATE COURT OF ILLINOIS
SECOND CIRCUIT

No. 76-483

PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

v.

VENTURA E. YBARRA, APPELLANT

ORDER DENYING REHEARING

ENTERED APRIL 7, 1978

The petition for rehearing is denied.

LOREN J. STROTZ, Clerk

IN THE APPELLATE COURT OF ILLINOIS
SECOND CIRCUIT

No. 76-483

PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

v.

VENTURA E. YBARRA, APPELLANT

CORRECTED NOTICE OF DENIAL
OF REHEARING AND CERTIFICATE
OF IMPORTANCE

ENTERED APRIL 10, 1978

The petition for rehearing or Certificate of Importance is denied.

LOREN J. STROTZ, Clerk

NOTIFICATION OF DENIAL OF PETITION
FOR LEAVE TO APPEAL BY
SUPREME COURT OF ILLINOIS

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706
(217) 782-2035

SEPTEMBER 28, 1978

State Appellate Defender
130 N. Wells Street—22nd Floor
Chicago, Illinois 60606

No. 50701—People of the State of Illinois, respondent, vs. Ventura E. Ybarra, petitioner. Leave to Appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell. L. Woods
Clerk of the Supreme Court

SUPREME COURT OF THE UNITED STATES

No. 78-5937

VENTURA E. YBARRA, APPELLANT

v.

ILLINOIS

ON CONSIDERATION of the motion of the appellant for leave to proceed herein *in forma pauperis.*

IT IS ORDERED by this Court that the said motion be, and tne same is hereby, granted.

March 26, 1979

Mr. Justice Powell took no part in the consideration or decision of this motion.

SUPREME COURT OF THE UNITED STATES

No. 78-5937

VENTURA E. YBARRA, APPELLANT

v.

ILLINOIS

APPEAL from the Appellate Court of Illinois, Second District.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 26, 1979

Mr. Justice Powell took no part in the consideration or decision of this matter.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 291778 378

Supreme Court, U.S.
FILED
MAR 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5937

VENTURA YBARRA,

Appellant

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee

ON APPEAL FROM THE ILLINOIS APPELLATE COURT

SECOND JUDICIAL DISTRICT

MOTION TO DISMISS

WILLIAM J. SCOTT
Attorney General
State of Illinois

DONALD B. MACKAY
MELBOURNE A. NOEL, JR.
JAMES A. DEVINE
Assistant Attorneys General
500 South Second Street
Springfield, Illinois 62706
(217) 782-1090

Attorneys for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5937

VENTURA YBARRA,

Appellant

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee

ON APPEAL FROM THE ILLINOIS APPELLATE COURT
SECOND JUDICIAL DISTRICT

ARGUMENT

I.

THE DECISION OF THE APPELLATE COURT OF ILLINOIS IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The only issue before this Court is whether the search of appellant's person pursuant to chapter 38, section 108-9 Illinois Revised Statutes was reasonable. The statute reads as follows:

> "In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack, or
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

The Appellate Court of Illinois noted that four States have similar statutes. In fact, eight States[1] in addition to

[1] Conn. Gen. Stat. Rev., §54-33b, D.C. Code, §23-524(g); Ga. Code Ann., §27-309; Kan. Stat. Ann., §22-2509; Mont. Rev. Code Ann., §95-710; Nev. Rev. Stat., §179.055; N. Y. Crim. Pro. Law, §690.15; Wis. Stat. Ann., §968.16.

Illinois, authorize this type of police action and three other States[2] grant this power through a specified form of warrant.

The rationale behind these statutes is a recognition by the various state legislatures of two important needs: to safeguard the police from physical attack while they execute a search warrant, and to preserve the small and easily concealable evidence of illegal gambling and narcotics violations. The Committee Comments of the Illinois Statute explain that the legislature is concerned with affording the searching officers with protection when they need it most, upon first arriving at the scene of the premises to be searched. Also pointed out in the Committee Comments is that the power is "parasitic to the warrant [and] should not be considered excessive in the hands of the executing officer" and the need "arises most often in the narcotics cases ...."

It is axiomatic that not all searches and seizures are prohibited by the Fourth Amendment, but only unreasonable searches and seizures. Mapp v. Ohio, 367 U.S. 643 (1961); Harris v. United States, 331 U.S. 145 (1947). In Ker v. California, 374 U.S. 23 (1963) this Court said of the reasonableness standard of the Fourth Amendment: "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective law enforcement in the States, ..." 374 U.S. 23, 34.

In assessing the ultimate standard of reasonableness each case must be determined on the basis of its own particular

[2] Del. Code Ann., Title 11, §2310; Mass. Gen. Laws, Ann., ch. 276, §2A; N. H. Rev. Stat. Ann. §696-A:3.

facts. Cady v. Dombrowski, 413 U.S. 433, 439 (1973); Cooper v. California, 386 U.S. 58 (1967).

In the instant case we see first, a valid search warrant authorizing the entry of police authorities; second, the property to be seized is fully described in the warrant and it is specifically limited to evidence of narcotics violations; third, the appellant was physically present when the police arrived at the place set forth in the search warrant; and fourth, based upon the facts of the case it was reasonable to believe that the appellant had evidence of narcotics violations on or about his person. Otherwise stated, there was a well founded suspicion or belief that the defendant was a participant in an ongoing criminal offense, namely, narcotics traffic.

Appellant contends that there is no basis in the record for the Illinois Appellate Court to have concluded that the allegation was made in the affidavit that the bar was frequented by persons illegally purchasing drugs. But an affidavit in support of a search warrant must be read in a common sense, not hypertechnical fashion. United States v. Ventresca, 380 U.S. 102, 108 (1965). Considerable latitude should be permitted for reasonable inferences from the facts stated. It was sufficiently clear that the bartender "Greg", was transferring heroin to persons who frequented the Aurora Tap. Upon entering the tavern, the officer saw about a dozen persons. The search warrant made it evident that the bartender would have heroin for sale on that day. The informant had recently observed a quantity of fifteen to twenty packets of heroin on the person of the bartender of the tavern described by Special Agent Johnson as a very dismal, drab, very plain, almost shabby type of establishment (R.31). Under the circumstances, it was reasonable for the police to infer that the persons in the tavern were actually on the

premises to purchase narcotics. Consider the serious nature of the crime suspected; consider the nature and character of the premises, its size and purpose; finally consider the difficulty of providing a specific detailed description of the whereabouts of the places to be searched and the slight risk that innocent people would be subject to the search.

Appellant, whose guilt is plain, seeks to exact a substantial cost to society's interest in effective law enforcement. He seeks, without justification, to keep reliable evidence from the view of justice. This Court has commented on the impact of the exclusionary rule in the quest for truth. United States v. Ceccolini, 435 U.S. 268, 275 (1978); Stone v. Powell, 428 U.S. 465, 489 (1976); United States v. Calandra, 414 U.S. 338, 350 (1974).

The State acknowledges that there are obvious limitations to the authority of police officers. It is not contended that the police could search a person on the pretext of seeking large items, such as a stolen television set, enumerated in a search warrant. See, Rauh and Silbert, Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970, 20 Am. U. L. Rev. 252 (1970). Nor is it contended that the authority to search the person found on the premises, under circumstances such that he would reasonably be expected to have concealed contraband on his person, would extend beyond the place specified in the search warrant. The authority to search a place designated in a warrant does not include additional or different places. Kleiningham v. United States, 109 U.S. App. D.C. 272, 287 F.2d 126, 129 (1960).

The dicta in United States v. Di Re, 332 U.S. 581 (1948) cited by appellant, does little to advance his position. There this Court invalidated a warrantless search of an automobile passenger whose only connection with the underlying

offense of sale of counterfeit ration coupons was his presence in the automobile at the time that the driver transferred the coupons to a government agent. In Di Re, supra, the government apparently conceded that it would not condone a search of all persons present in a residence based solely upon a search warrant for those premises.

Needless to say, analogous factual situations have been considered by the courts. Chief Justice Weintraub of New Jersey in a cogent opinion, upheld the practice of a search of all persons present on the premises in State v. De Simone, 60 N.J. 319, 288 A.2d 849 (1972). Under the De Simone rationale, this power given to the police, hinged upon the valid search warrant, is tested after the fact by a motion to suppress. The facts in De Simone were essentially that a warrant had been issued to search a specific automobile "and all persons found therein" for gambling paraphernalia. The automobile had been observed to be an instrument in a so-called "lottery drop." Search of the defendant, a passenger in the automobile, revealed lottery slips on his person. There the court observed that "so long as there is good reason to believe that anyone present at the anticipated scene will probably be a participant, presence becomes the descriptive fact satisfying the aim of the Fourth Amendment." 288 A.2d 849, 850.[3]

As noted in the opinion of the Illinois Appellate Court, the Supreme Court of Kansas in State v. Loudermilk,

[3] In support of the proposition of law that the defendant was properly subject to search where he can be seen to have had a physical nexus to the ongoing crime is cited, inter alia, Willis v. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970) which sustained a Georgia statute similar to that of Illinois in a situation involving persons in an apartment where drugs were sold; Johnson v. State, 440 S.W.2d 308 (Tex. Cr.App. 1969) which involved a search of an apartment where "pot" parties were commonplace; and People v. Nicoletti, 60 N.Y.Misc. 2d 108, 302 N.Y.W.2d 618 (1969) which concerned the search of persons found on the first floor of a specified premises wherein a dice game was operating.

208 Kan. 893, 494 P.2d 1174 (1972) upheld a state statute with provisions comparable to the contested Illinois statute. Beginning with the observation that the statute provides for only "reasonable" detention and search, the court announced that it was constitutional on its face. The court then examined two Illinois decisions which have recognized that an immediate search of persons present on the premises to be searched pursuant to a warrant is essential both to secure the premises and to execute the warrant. It considered People v. Pugh, 69 Ill.App.2d 312, 217 N.E.2d 557 (1st Dist., 1966), which involved a search for narcotics under a warrant for the apartment of the defendant's brother. While the officers were executing the warrant the defendant rang the doorbell, was admitted, and the police searched his pants pocket to discover a quantity of heroin. In Pugh, supra, the court reasoned that the execution of search warrants in narcotics cases is a "risky business at best." (In accord with Pugh, supra, is People v. Kielczyski, 130 Ill.App.2d 231, 264 N.E.2d 767 (1st Dist., 1970); People v. Harrison, 83 Ill.App.2d 90, 226 N.E.2d 418 (1st Dist., 1967)). Two years later in State v. McClelland, 215 Kan. 81, 523 P.2d 357 (1974) the court re-affirmed its belief that the Kansas statute did not offend the Fourth Amendment.

The District of Columbia upheld their statutory provision in United States v. Graves, 315 A.2d 559 (1974). There the factual setting parallels the case at bar. A search warrant was issued for evidence of illegal gambling in a small delicatessen. About a half dozen persons were found on the premises and searched by the police. Gambling slips were found on the person of the defendant. The court in Graves, supra, rejected the notion that the statute would authorize the search of a large number of persons present in a supermarket or a large department store where there is absolutely

no nexus between them and the articles constituting the object of the search. In Graves, supra, the police officers had the benefit of an informant's tip that the persons inside the delicatessen at the time were not mere patrons but participants in illegal gambling. In the instant case the affiant stated unequivocally that his informant had advised him that the bartender, "Greg," would be selling heroin at the place and time in question. We submit that it is not unreasonable to believe that the bartender might have sold heroin to the several persons present in this shabby one room tavern. Surely the law is not so impotent as to permit the objects of a judicially ordered search to be carried off under the nose of the police. Olympia v. Culp, 136 Wash. 374, 377, 240 P. 360, 361 (1925).

Other states, without the benefit of legislative action, have passed on the question of the search of all persons with a connection to the premises to be lawfully searched. The Texas courts have held that the police authorities not only have the right to search persons found on the premises in the execution of a search warrant but that they have the affirmative duty to do so. Brown v. State, 498 S.W. 2d 343, 346; (Tex. Cr. App., 1973) and cases cited therein.

In Samuel v. State, 222 So.2d 3 (Fla., 1969), the Supreme Court of Florida considered the validity vel non of a search warrant which authorized the search of a building as well as all persons therein who were suspected of being connected with the illegal activity of gambling. As said by the court:

> "It would obviously be difficult if not impossible to identify in advance all the persons in a gambling establishment who might

be guilty of a violation of the gambling laws."

222 So.2d 3, 5 (1969)[4]

This Court has previously considered the possibility that evidence may be lost as one exigent circumstance justifying a warrantless search. Schmerber v. California, 384 U.S. 757, 770-7 (1966); Preston v. United States, 376 U.S. 364, 367 (1964). A fortiori the law cannot countenance the object of a judicially approved search such as this to be so easily frustrated as appellant would have it.

[4] See also: Commonwealth v. Smith, Mass. 348 N.E.2d 101 (1976) cert. denied 429 U.S. 944; State v. Halverson, 21 Wash.App. 35, 584 P.2d 408 (1978) and cases cited therein; State v. Procce, 5 Conn. Cir. 637, 260 A.2d 413 (1969); Thomas v. United States, 352 A.2d 390 (1976) citing with approval People v. Graves, infra; and Walker v. United States, 327 F.2d 597 (D.C. Cir., 1963), cert. denied 377 U.S. 956 (1968) in which it was held that a search warrant for premises will authorize a search of objects held in the hand of a person found on the specified premises.

CONCLUSION

WHEREFORE, it is respectfully urged that the appeal be dismissed.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

DONALD B. MACKAY
MELBOURNE A. NOEL, JR.
JAMES A. DEVINE
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
(217) 782-1090

Attorneys for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5937

VENTURA YBARRA, Appellant

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Appellee

ON APPEAL FROM THE ILLINOIS APPELLATE COURT,
SECOND JUDICIAL DISTRICT

APPELLANT'S REPLY TO MOTION TO DISMISS

Ralph Ruebner, Deputy Defender
OFFICE OF THE STATE APPELLATE DEFENDER
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Appellant

Alan D. Goldberg
Assistant Defender

Of Counsel

IN THE

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APPELLANT'S REPLY TO MOTION TO DISMISS

The State argues that the search in this case was conducted pursuant to probable cause or reasonable suspicion. In fact, the testimony of the police officer who conducted the search shows that he did not have probable cause or reasonable suspicion that a crime had been committed by any patron or that any patron was armed, dangerous, or hostile. Therefore, the only possible justification for the search which the State can advance is the authority provided by Ill. Rev. Stat., 1975, Sec. 108-9, a statute which cannot pass constitutional muster.

As did the Appellate Court of Illinois, the State simply ignores the most critical facts of this case, and thereby distorts the issue. The State would have this Court believe that "there was a well founded suspicion or belief that the defendant was a participant in an ongoing criminal offense, namely, narcotics traffic." (Motion to Dismiss, p.3) But Officer Jerome Johnson made it absolutely clear that he had no such suspicion prior to his search of Ybarra. Specifically, he testified that he had no indication that Ybarra or any of the other patrons had committed any crime. (R.27) [See excerpts of Officer Johnson's testimony at Appendix A of this brief.] The State does not dispute the fact that the searching officer testified that he had no suspicion of criminal activity, nor do they point to any testimony which would refute the appellant's claim on this point. It is difficult to imagine what could be more important in determining whether a police officer had cause to conduct a search than his own testimony, yet this testimony is ignored by the State.

The State argues that it was reasonable to believe that the twelve patrons were purchasing narcotics (Motion to Dismiss, page 3), and that the search of all twelve patrons was therefore proper. This contention is refuted by the facts. The Aurora Tap was a public drinking establishment. Is the State saying that it was reasonable to believe that everyone was in this public bar for an unlawful purpose, that no one was drinking beer or playing pinball or conversing with friends? (It should be noted in this regard that there was no evidence that Greg, the bartender who was supposedly selling narcotics, was even in the bar at the time of the police entry.) In fact, this case presents a grossly unreasonable exercise of police authority, as demonstrated by the officer's admission that the search was not based on any suspicion.

The facts of this case, which remain undisputed, show that the searching officer possessed no suspicion that the

patrons were armed or hostile, were engaged in criminal conduct, or were connected to the contraband which was sought. (R.26-30, 76-80; See excerpts from Officer Johnson's testimony at Appendix A of this Brief.) The question presented by this case therefore narrows to this: May a State statute authorize a search under the above circumstances pursuant to a warrant for the premises? The answer must be no, for otherwise every warrant would become an overbroad general warrant. (See Jurisdictional Statement, pp. 7-11.) The Illinois statute involved herein therefore is unconstitutional.

Respectfully submitted,

RALPH RUEBNER, Deputy Defender
Office of the State Appellate Defender
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5372

Counsel for Appellant

Alan D. Goldberg
Assistant Defender

Of Counsel

APPENDIX A

Excerpts from testimony of Officer Jerome Johnson at Suppression Hearing and Trial.

APPENDIX A

Q. At the time you undertook to search Mr. Ybarra, did you know Mr. Ybarra had committed a crime.

A. No.

Q. Did you know Mr. Ybarra had done anything that was violative of the Ordinances of the City of Aurora?

A. No.

Q. Or of the State of Illinois?

A. No.

Q. Or of any Federal Statutes?

A. No.

Q. Or any of the other patrons that were there?

A. No.

Q. And thereafter you conducted a search of Mr. Ybarra's person, is that correct?

A. That's correct.

Q. He moved -- He did not move towards you?

A. No.

Q. Did he give you any gestures or overt actions indicative of criminal conduct?

A. No. (R.27-28)

* * *

Q. As you first observed Mr. Ybarra did you notice anything protruding from his coat pocket?

A. No.

Q. Anything protruding from his pants pocket?

A. No.

Q. Did you notice anything about his person that would give you the impression of a weapon?

A. No.

Q. At the time that you observed Mr. Ybarra, did you have any knowledge that Mr. Ybarra had committed any act violative of the Ordinance of the City of Aurora?

A. No.

Q. At the time that you first observed him did you notice or did you have knowledge as to whether or not Mr. Ybarra committed any act violative of the Statutes of the State of Illinois?

A. I had no such knowledge.

Q. At the time you observed him did you notice that he had committed any act violative of any Federal Statute?

A. No.

Q. To the best of your knowledge he had done nothing wrong?

A. Correct. (R.77-78)

* * *

Q. You returned to search Mr. Ybarra again?

A. Correct.

Q. Did you observe a weapon on him at that time?

A. No.

Q. Did you have any knowledge that he committed an offense at that time --

A. No.

Q. (continuing) -- of either a State, local or Federal statute?

A. No, I didn't.

Q. And you submitted him to a search again?

A. Correct.

Q. For weapons?

A. No.

Q. Did you have any knowledge that he had anything upon his person that was violative of any Statute?

A. No. (R.79-80)

Supreme Court, U.S.
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IN THE

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VENTURA E. YBARRA,
Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

On Appeal From The Appellate Court Of Illinois, Second District

BRIEF FOR THE APPELLANT

RALPH RUEBNER,
Deputy Defender

ALAN D. GOLDBERG,
Assistant Defender
Office of the State Appellate Defender
First Judicial District
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5472
Counsel For Appellant

MARY ROBINSON,
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120
Of Counsel

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---

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District, is reported at 58 Ill. App. 3d 57, 373 N.E. 2d 1013 (1978) and is reproduced in the Appendix (hereinafter "A") at pages A. 79-87. Copies of the unreported orders of the Appellate Court denying rehearing and a certificate of importance may

be found at A. 88-89. The unreported order of the Illinois Supreme Court denying leave to appeal appears at A. 90.

JURISDICTION

The decision of the Illinois Appellate Court in this case, affirming appellant's conviction for possession of heroin, was issued on February 9, 1978. (A. 79) Rehearing was sought, but was denied on April 7, 1978. (A. 88) The Appellate Court was also asked to certify the importance of this question to the Illinois Supreme Court, but this request was denied on April 10, 1978. (A. 89) A petition for leave to appeal was filed, but was denied by the Illinois Supreme Court on September 28, 1978. (A. 90) Notice of Appeal to the United States Supreme Court was filed on December 1, 1978, in the Illinois Appellate Court for the Second Judicial District. The Jurisdictional Statement was filed in this Court on December 22, 1978, and probable jurisdiction was noted on March 26, 1979. (A. 92)

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2), for the validity of a state statute was drawn into question below "on the grounds of its being repugnant to the Constitution . . . of the United States and the decision [was] in favor of its validity". 28 U.S.C. §1257(2).

QUESTION PRESENTED

Can Illinois By Statute Give Police Officers The Authority To Search All The Patrons Of A Public Establishment Incident To The Execution Of A Search Warrant For The Premises, Where The Officers Did Not Have Probable Cause Or Reasonable Grounds To Believe That Any Patron Had Committed An Offense, Was Connected To The Contraband For Which They Were Searching, Or Posed A Threat To Their Safety?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

> the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9 provides:

> *Detention and Search of Persons on Premises.* In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack, or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

STATEMENT

Ventura Ybarra was charged by a Kane County, Illinois grand jury with unlawful possession of heroin. (A. 18) The defense filed a pre-trial motion to suppress the heroin that had been seized from Ventura Ybarra during a search of Ybarra and approximately twelve other lawful patrons of a public tavern known as the Aurora Tap. (A. 19) The basis of the motion was that the officers who conducted the search had no probable cause to search Ybarra, and had no warrant respecting him. (A. 19) At the hearing on this motion, Agent Jerome Johnson testified as follows:

On March 1, 1976, at about 4:10 p.m., while working as an investigator for the Illinois Bureau of Investigation, Johnson participated in the execution of a search warrant at the Aurora Tap, a public drinking establishment. (A. 24) Also taking part in the execution of the warrant were Special Agents Doster, Moraitis and Santercier, Detective Weaver, Lieutenant Williams, and "several other uniformed officers from the Aurora Police Department". (A. 24; See also preliminary hearing transcript at A. 9.) The search warrant authorized the search of the Aurora Tap Tavern, and a bartender within it by the name of Greg, for evidence of the offense of possession of a controlled substance. (A. 25,5) Neither the warrant nor the complaint for warrant indicated that patrons of the tavern were involved in any criminal activity. (A. 2-6)

Agent Johnson stated that nine to thirteen patrons were in the tavern when he arrived there, and that he was not looking for anyone in particular. (A. 26; See also trial transcript at A. 48.) Johnson had not seen any of the patrons before. (A. 26) On entering the tavern, the agents announced their purpose and advised everyone to stay where they were, and that they were going to make a "cursory search for weapons". (A. 27,30)[1] The lighting was sufficient in the tavern

---

[1] At the preliminary hearing, Johnson's testimony was as follows:

> We then advised all patrons to rise in their seats for a cursory search for weapons. At that time Special Agent Doster ordered me to search one Ybarra for a controlled substance. (A. 9)

for him to observe the customers. (A. 27) Johnson stated that when the officers entered, Ventura Ybarra was standing by a pinball machine, dressed in a red and black jacket. (A. 27) He noticed nothing protruding from Ybarra's clothing, and there was no indication that he had a weapon or was hostile. (A. 27-29) Ybarra was standing in the general vicinity of all the other patrons. (A. 27)

At this point, Agent Johnson searched every customer, including Ventura Ybarra. (A. 27-28,31) At the time that Ybarra was searched, Agent Johnson had no knowledge or indication that he or any of the other customers had committed any offense. (A. 28) Ventura Ybarra did not make any threatening moves toward anyone nor any gesture indicative of criminal conduct. (A. 28-29) Agent Johnson described his search of Ybarra as "more or less a pat down, cursory search for weapons for our protection". (A. 32) Upon questioning by defense counsel, he stated that he found nothing, but on being cross-examined by the State's Attorney, he stated he felt a cigarette pack with objects in it. (A. 28, 32) After completing his search of all the patrons in the tavern, he returned and searched Ybarra a second time. (A. 32) Agent Johnson still had no indication that Ybarra had a weapon prior to this second search, and Ybarra's hands, which were empty, were visible to him. (A. 29) Johnson also had no indication prior to this second search that Ybarra had committed an offense, or that he had any contraband on his person. (A. 29; See also

trial transcript, at A. 59.) The second search of Ybarra took place two or three minutes after the first. (A. 32) Agent Johnson testified that he removed six tin foil packets of heroin from Ybarra's pocket during this second search. (A. 30,50)[2]

Johnson also stated that there was one entrance and one exit in the tavern and that the tavern was a fairly large room. (A. 31; See also trial transcript, at A. 59.) Both during and after the search, patrons were prevented from entering or leaving. (Trial transcript, A. 60)

During argument on this motion, the State claimed that the search of Ybarra was justified under Chapter 38, Section 108-9 of the Illinois Revised Statutes, which is set out in the "Constitutional and Statutory Provisions Involved" section of this brief. The prosecutor conceded that probable cause to search Ybarra did not exist, but he argued that the statute provides that "when the police officers are executing a search warrant, the people who are there are also part of the premises". (A. 39) The defense attorney argued that this statute was of dubious constitutionality, citing *United States* v. *DiRe*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948). (A. 41)

The Court denied the motion to suppress and made the following findings of fact:

---

[2] At trial, Johnson testified that he patted Ybarra down again when he returned to him after searching the other patrons, felt something in Ybarra's pocket during the second pat-down, and then placed his hand in Ybarra's pocket. (A. 50, 60-61)

> I would make the finding of fact that the search for weapons was conducted and that search was under Section (b) [of Sec. 108-9]: To prevent the disposal or concealment of any instrument, article or things described in the Search Warrant. (A. 43)

The case proceeded to a trial before the court, and Ybarra was found guilty of possession of heroin. (A. 70) Ybarra was then sentenced to two years probation. (A. 78)

An appeal was taken to the Appellate Court of Illinois, Second Judicial District. The only issue on appeal was whether the search was violative of the Fourth Amendment and whether Section 108-9, if construed so as to permit searches of this type, was unconstitutional. The Appellate Court summarized its holding as follows:

> In summation, we do not find Section 108-9 of the Illinois Code of Criminal Procedure to be unconstitutional in its application to the facts before us. We therefore affirm the judgment of the conviction of the defendant herein. *People* v. *Ybarra*, 373 N.E. 2d 1013, 1017. (A. 87)

The Appellate Court also stated that "in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs". 373 N.E. 2d at 1015. (A. 82) However, no such allegation is contained in the complaint for search warrant. (A. 2-3)

Following the denial of a petition for rehearing and for certificate of importance by the Appellate Court, appellant filed a Petition for Leave to Appeal in the Illinois Supreme Court challenging the reasonableness of the search and the constitutionality of the Appellate Court's interpretation of the statute. This petition was denied. (A. 88-90)

SUMMARY OF ARGUMENT

In the course of executing a search warrant at a public tavern in Aurora, Illinois, a group of at least seven or eight police officers searched all of the patrons of the tavern, including the appellant. The officers had no reasonable suspicions of any kind regarding these patrons, and the trial and appellate courts upheld the search, not on traditional grounds of probable cause or articulable suspicion, but on the basis of an Illinois statute which permits the search of all those present where a search warrant is being executed.

The police procedure utilized here violated the Fourth Amendment, because a citizens's mere presence on premises where a search warrant is being executed does not make him subject to search. The statute which was construed by the Illinois courts as allowing this conduct is unconstitutional as applied to the facts of this case, for it operated to transform the search warrant into an illegal general warrant. Since no facts justifying the intrusions were present,

the police conduct in searching Ventura Ybarra and the other patrons was illegal.

ARGUMENT

Where A Group Of Police Officers Searched All The Patrons Of A Public Establishment Incident To The Execution Of A Search Warrant For The Premises, Even Though The Officers Did Not Have Probable Cause Or Reasonable Grounds To Believe That Any Patron Had Committed An Offense, Was Connected To The Contraband For Which They Were Searching, Or Posed A Threat To Their Safety, The Officers' Actions Violated The Fourth Amendment. The Illinois Statute Which Has Been Held To Permit This Conduct Is Unconstitutional As Applied

A. *Introduction*

The record in this case presents a simple, yet striking, fact situation. A group of at least seven or eight police officers and Illinois Bureau of Investigation agents entered a public tavern in Aurora, Illinois, for the purpose of executing a search warrant for the premises and the bartender. The warrant authorized a search for evidence of the crime of narcotics possession. There were between nine and thirteen patrons in the bar. Each and every one of these patrons was then searched, although the testimony of the officer who personally conducted the searches makes it clear that

he had no suspicions of any kind regarding the patrons. Ventura Ybarra, one of the patrons, was searched twice, but the officer's testimony establishes that he had no suspicions regarding Ybarra before either the first or the second search. It is the appellant's contention that this procedure was violative of the Fourth Amendment to the United States Constitution, and that the Illinois statute which authorizes it is unconstitutional as applied.

B. *The officers who executed the warrant did not have probable cause or reasonable grounds to believe that Ventura Ybarra or any other patron possessed the contraband for which they were looking or posed a threat to their safety.*

Agent Jerome Johnson was the only witness at the hearing on Ybarra's motion to suppress evidence. His testimony makes it clear that the search of the patrons of the Aurora Tap was not based on any articulable suspicion or probable cause regarding the patrons, but rather was conducted simply as a matter of course.

Immediately upon entering the bar, the police ordered every person in the Aurora Tap to submit to what Johnson described as a "cursory search for weapons". (A. 27-30) Yet Johnson admitted that he had no indication that Ventura Ybarra or any other patron was violating any law, and also testified that

Ybarra made no threatening moves or gestures, and that he did not give any indication of having a weapon. (A. 27-29) Johnson could point to no "specific and articulable facts" justifying a pat-down for weapons, *cf. Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968), nor did he have probable cause to believe that the patrons possessed narcotics.

After searching every patron once, Agent Johnson searched Ventura Ybarra a second time, even though he had felt nothing more suspicious than "a cigarette pack with objects in it" during his first pat-down of Ybarra. (A. 28 32) Johnson testified that prior to this second search he still had no indication that Ybarra had a weapon or contraband. (A. 29 59) It was during the second search that Johnson extracted six tin foil packets containing heroin from Ybarra's pocket. Again, however, Johnson could point to no facts which would reasonably justify a search.

It is noteworthy that the prosecutor's argument at the hearing on the motion to suppress was based solely on Illinois statute concerning the search of persons present where a search warrant is being executed. Indeed, the prosecutor conceded that probable cause to search Ybarra did not exist, but argued that the statute indicated that "when the police officers are executing a warrant, the people who are there are part of the premises". (A. 39) The prosecutor's argument points up the fact that the searches were based merely on the presence of the patrons on the premises.

The trial court and the Appellate Court found that the search was justified under Illinois Revised Statutes, 1975, Chapter 38, Section 108-9:

> *Detention And Search Of Persons On Premises.*
>
> In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack,
>
> or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

Both courts relied on Part (b) of the statute to uphold the search. Yet in construing the statute, neither court required a showing that a searching officer believe that the person searched is in possession of the contraband or poses a threat to the officer's safety in order to justify the search. The statute as construed by the Appellate Court thus gives carte blanche to police officers to search any and all persons they may encounter while executing a search warrant. As will be shown, such a holding is in conflict with the Fourth Amendment.

C. *The search of Ventura Ybarra at the Aurora Tap, merely because he happened to be present when a search warrant was being executed, violated the Fourth Amendment.*

Ever since the Government conceded, in the widely cited case of *United States* v. *DiRe*, 332 U.S. 581, 587,

68 S. Ct. 222, 225, 92 L. Ed.210, 216 (1948), that a search warrant for premises could not justify a search of all persons on them, this concept has been accepted virtually without question. *See DiRe* and the authorities cited in footnote below.[3] Another rule, equally well accepted, is that a person's mere presence at the scene of suspected criminal activity, without more, does not give rise to probable cause to search that person. *Sibron* v. *New York*, 392 U.S. 40, 62, 88 S. Ct. 1889, 20 L. Ed.2d 917, 934 (1968). The conduct of the police in this case violated both rules, for, as shown above, the record demonstrates that the police searched the patrons solely because of their presence in the bar.

---

[3] *U.S.* v. *Branch*, 545 F. 2d 177, 181 (D.C. Cir., 1976);
U.S. v. *Festa*,192 F. Supp. 160, 163 (D.C. Mass., 1960);
U.S. v. *Haywood*, 284 F. Supp. 245 (D.C. La., 1968);
City of Tacoma v. *Mundell*, 6 Wash. App. 673, 495 P. 2d 682, 685 (1972);
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State v. *Cochran*, 135 Ga. App. 47, 217 S.E. 2d 181 (1975).

The Appellate Court's holding is also in conflict with the fundamental Fourth Amendment proposition that a search warrant must particularly describe the objects of the search. *Stanford* v. *Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). This proscription against "general warrants" has been held to be violated where a search warrant gives the police the power to search unspecified persons. *Wilson* v. *State*, 136 Ga. App. 70, 221 S.E. 2d 62 (1975); *State* v. *Sims*, 75 N.J. 337, 382 A. 2d 638 (1978); *State* v. *Wise*, 284 A. 2d 292 (Del. Super. Ct., 1971); *Commonwealth* v. *Platou*, 455 Pa. 258, 312 A. 2d 29 (1973). The violation is certainly more severe where the State seeks by statute to automatically include such a power in every search warrant. The statute involved in the instant case, as construed by the Appellate Court, turns every Illinois search warrant into a general warrant.

A number of courts have dealt with the question of what circumstances must be present to justify the search of a person who is found at premises where a search warrant is being executed. This question has arisen both in states with statutes similar to Illinois', and in states without any statutes on this subject. An examination of the cases reveals that where, as here, there is no reason to believe that a person present on premises where a search warrant is being executed possesses the property being searched for or poses a danger to police officers, the courts have held that the search of such a person is impermissible.

Thus, in *State* v. *Helton*, 146 N.J. Super. 98, 369 A. 2d 10 (1975), *aff'd* 72 N.J. 169, 369 A. 2d 10 (1977),

the court held that the search of the defendant and nine other patrons of a tavern, which was being searched for narcotics pursuant to a warrant, was illegal, since there was no reason to believe that the defendant was in possession of the narcotics sought by the police. The court stated that in the absence of probable cause to believe that the defendant was in possession of the narcotics, the defendant could not be searched. *Accord, People* v. *Nieves,* 36 N.Y. 2d 396, 330 N.E. 2d26 (1975); *State* v. *Mendez,* 155 Ariz. 367, 565 P. 2d 873 (1977). In *Smith* v. *State,* 139 Ga. App. 129, 227 S.E. 2d 911 (1976), the Georgia Court of Appeals, in construing a statute virtually identical to the present one, held that in order for a search to be permissible there must be facts and circumstances present which make it likely that the items sought are being concealed or that the party searched is armed. *See also Brown* v. *Wainwright,* 337 So. 2d 416 (Fla. App., 1976); other cases cited in footnote 3, *supra;* W. LaFave, *Search and Seizure; The Course of True Law . . . Has Not . .. Run Smooth,* 1966 Ill. Law Forum 266, 272; Comment, 58 Cornell L. Rev. 614 (1973).

The proposition for which these authorities stand is an elementary one: there must be reasonable justification for the police to search a person whom they find on premises for which they have a search warrant. In this case, there simply was no reasonable justification. Neither the search warrant nor the complaint for search warrant gave the police any reason to be-

lieve that the patrons were dangerous or were involved in the criminal activity under investigation. Nothing in the circumstances which confronted the officers when they entered the Aurora Tap could justify the intrusion. The only reason for these searches was the presence of the patrons on the premises, which is simply not a valid justification for a police intrusion.

If the police conduct which occurred here is upheld by this Court, countless citizens who frequent public establishments will ~~be~~ have to submit to searches merely because they have the bad fortune to be present at a place where a search warrant is executed. This Court is asked to hold that this grossly unreasonable exercise of police authority violated the Fourth Amendment.

CONCLUSION

For the reasons stated, the judgment of the Illinois Appellate Court should be reversed.

RALPH RUEBNER
Deputy Defender

ALAN D. GOLDBERG
Assistant Defender
Office of the State Appellate Defender
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel For Appellant

MARY ROBINSON,
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
82 Douglas Avenue
Elgin, Illinois 60102
Of Counsel

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No. 78-5937

IN THE

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Appellant,

vs.

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Appellee.

On Appeal From The Appellate Court Of Illinois,
Second District

BRIEF FOR THE APPELLEE

WILLIAM J. SCOTT
Attorney General
State of Illinois

DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.
Assistant Attorneys General
188 W. Randolph St. (Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Appellee.

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BRIEF FOR THE APPELLEE

The State of Illinois accepts Appellant's statements in those portions of his Brief labeled "Opinions Below", "Jurisdiction", and "Constitutional Provisions and Statutes Involved".

QUESTIONS PRESENTED

1. Is it reasonable, under the Fourth Amendment and this Court's decisions in the *Terry* v. *Ohio* line of cases, for officers executing a search warrant seeking heroin allegedly being offered for sale in a small tavern to frisk all patrons present at the time?

2. Did the frisk of Ybarra yield probable cause to believe he was carrying a controlled substance specified in the search warrant, making the search reasonable regardless of any statutory authorization?

3. Alternatively, did the lower courts constitutionally apply Ill. Rev. Stat., Ch. 38, § 108-9, to this case when they held that it permitted a search of Ybarra for controlled substances based on a reasonable belief that he might be concealing on his person the drugs sought in the warrant?

STATEMENT OF THE CASE

The State of Illinois accepts the "Statement" contained in Appellant's Brief as being accurate and sufficient for an understanding of this appeal, with the exception of the following errors or omissions:

The complaint for a warrant to search the Aurora Tap did indicate that patrons of the tavern were involved as purchasers in illegal narcotics traffic. The complaint stated that the informant had been in the tavern on at least ten other occasions and had observed tinfoil packets on the bartender, Greg, and in a drawer behind the bar; the informant stated that he had a recent conversation with Greg and was advised that Greg would have heroin for sale on Monday, March 1, 1976, the date of the complaint for search warrant. (A. 3) The informant also advised that during the weekend on which he had the conversation with Greg, he had observed 15 to 25 tinfoil packets on Greg's person and behind the bar and that he was aware that tinfoil packets are a common method of packaging heroin. (A. 3) The Return to the executed search warrant lists, among other items seized during the search of the Aurora Tap in addition to the tinfoil packets taken from Ybarra, two baggies of a "green plant-like substance" and "hypodermic needles". (A. 7)

At the suppression hearing in State court, agent Jerome Johnson of the Illinois Bureau of Investigation answered affirmatively to a leading question by defense counsel, that he had not found anything upon Mr. Ybarra during his first search, in the context of several questions seeking any overt actions that might have been observed or any weapons that might have been found on the first search of Mr. Ybarra. (A. 28) However, when specifically questioned in a chronological fashion by the prosecutor, agent Johnson described the first search of Ybarra as being "more or less a pat down, cursory search for weapons for our protection". He then stated that

during this search he felt "a cigarette pack with objects in it". (A. 32) Johnson then searched the other patrons and returned a few minutes later to conduct a search of Ybarra's pockets specifically. (A. 32)

Following defendant's bench trial, his attorney once again argued that the tinfoil packets of heroin had been unconstitutionally taken from his client and the trial judge once again dealt with this question. (A. 68) He further explained his ruling on the Motion to Suppress by saying:

> I do not agree as a matter of fact that there is no probable cause to search the defendant consistent with those cases that you just cited. Certainly to say that there was no probable cause would be a conclusion, and that would have to stand on the facts in the case and not what any agent thought or what anyone thought it would be, what the facts were, and in line with those cases that it is reasonable to search people in that situation, I never intended to make a finding there was not probable cause to search, but I still have to limit it between the framework of the cases the State cited. Motion denied, finding will be guilty. (A. 68-69)

The Appellate Court's holding that the Aurora Tap was frequented by persons illegally purchasing drugs was based upon the complaint for search warrant, the last two paragraphs cited above. (A. 3)

SUMMARY OF ARGUMENT

I. Appellee submits that, under *Terry* v. *Ohio*, 392 U.S. 1 (1968) and its progeny, the first pat-down search of Ybarra was a reasonable frisk, which yielded probable cause to believe that he had concealed on his person the controlled substances sought in the search warrant. The serious nature of the contraband sought (heroin), the general experience of drug enforcement officers with heroin dealers and users, the informant's revelation that drug sales would take place that day, the relative numbers of patrons and police and the character of the premises being searched all combined to convince reasonable officers that a weapons search was necessary for their safe execution of the warrant. The original frisk of Ybarra for weapons was not more intrusive than necessary to discover possible weapons in his outer clothing.

During the frisk Agent Johnson felt a "cigarette pack with objects" (apparently not cigarettes) in it. When he returned to Ybarra again after frisking other patrons, Johnson relocated the objects and retrieved them from defendant's pants pocket, discovering that they were tinfoil packets of the type sought in the warrant. Having information about planned tinfoil-packaged heroin sales at the tavern that day, inferring that sales would be to persons patronizing the small tavern, and knowing that cigarette packs, not normally used for anything but cigarettes, would be serviceable drug containers, Johnson had probable cause after the weapons frisk to believe Ybarra was carrying some of the illegal narcotics which would be or had been sold at the Aurora Tap. Contraband discovered as a result of a lawful frisk is sizeable without a warrant and admissible into evidence.

Probable cause is an objective standard determined from the facts of record and judicially noticed, all to be considered by the reviewing court. The court's determination of probable cause cannot depend on whether the searching officer knew

there was probable cause at the time or whether he was led through a legal analysis of the probable cause factors during the suppression hearing.

Since independent probable cause and exigent circumstances gave rise to Johnson's second search of Ybarra which yielded the packets of heroin, application of the Illinois Statute, Ch. 38, § 108-9(b), is not necessary to uphold this search and seizure. Judicial restraint dictates, therefore, that no decision be made on the constitutionality of the statute since it was applied to a search conforming in every way to Fourth Amendment requirements.

II. Alternatively, if this court's interpretation of the Record prevents it from viewing the first pat-down as a lawful frisk producing probable cause to search Ybarra for packets of heroin, the appellee submits that both searches were justified by Ill. Rev. Stat., Ch. 38, § 108-9(b), as properly construed and applied by the Illinois courts. The statute as interpreted does *not* allow automatic full searches of all unknown persons found on any premises being searched pursuant to a warrant. It has been construed and applied so as to require a reasonable connection between the person being tactilely searched and the premises, or between a person being searched and the criminal activity on the premises.

The officers executing the instant search warrant for the Aurora Tap had information (already accepted by an impartial issuing judge) that tinfoil packets had frequently been seen behind the bar by a patron and that such packets containing heroin would be available for sale at the bar on March 1, 1976. Contained within this information was the undeniable inference that some patrons of the small tavern were the intended purchasers of the heroin sought in the warrant. The patrons in the tavern while the warrant was being executed were people connected with the tavern by their choice to be present in a place where possession and sale of narcotics were rather open

and notorious. If they could not be patted-down as part of the premises search, then the warrant's purpose would likely be defeated as some or all of the patrons walked out with some or all of the objects sought. This result would cause the search warrant, the constitutionally preferred foundation for all official searches, to be brought into disrepute in the eyes of drug enforcement officers and drug violators alike.

In the circumstances of a narcotics raid on a public establishment with a warrant, there is no way to list in advance in the complaint everyone who will be present on the premises when the warrant is executed. Nor will simple observation or inquiry usually allow officers to determine with probable cause which of the patrons are involved in narcotics trade.

Thus, traditional probable cause to search an individual patron for drugs (and of course the warrant preferrence with its attendant delay) will frequently be an insurmountable obstacle to the full execution of the already issued premises search warrant. Probable cause should therefore not be required for a pat-down of patrons in these situations.

The balancing of governmental and private interests with various types of intrusions, the test employed by this Court to permit searches on less than traditional probable cause in *Terry* v. *Ohio,* 392 U.S. 1 (1968) and *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) should again be employed to validate the present search and the application of Ch. 38, § 108-9 in this case. The legitimate needs of law enforcement officers executing narcotics search warrants should be met by a rule allowing a pat-down search (a limited intrusion) of persons on compact premises where the complaint alleges drug sales occurred or were scheduled and the officers have a reasonable belief (suspicion) that the persons present are connected to the premises or to the criminal activity.

ARGUMENT

I.

FOLLOWING A LAWFUL WEAPONS FRISK WHICH REVEALED THE FORM OF A CIGARETTE PACK WITH OBJECTS IN IT, THE SECOND SEARCH OF YBARRA WAS BASED UPON PROBABLE CAUSE TO BELIEVE HE WAS CARRYING IN HIS POCKET A CONTROLLED SUBSTANCE SPECIFIED IN THE TAVERN SEARCH WARRANT; THE SEARCH DURING EXECUTION OF A WARRANT WAS THEREFORE REASONABLE UNDER THE FOURTH AMENDMENT, REGARDLESS OF ANY SPECIFIC STATUTORY AUTHORIZATION.

Although the Illinois Appellate Court did not rely on this analysis in affirming the conviction and the trial judge only mentioned the separate weapons search in denying the motion to suppress (A. 43), appellee submits that Ybarra's conviction should be affirmed because the first pat-down search of his person was a reasonable frisk, under *Terry* v. *Ohio,* 392 U.S. 1 (1968) and its progeny, which then yielded probable cause to believe that Ybarra had some of the controlled substances sought in the search warrant in his pocket. Once there was probable cause to believe packets of heroin could be found on him, the second pat-down and search of Ybarra met the standard Fourth Amendment requirement for a valid search in exigent circumstances, where obtaining a warrant would either allow the contraband to be disposed of or would constitute a greater intrusion on the privacy of the person being searched.

A.

It Is Always Reasonable For Officers To Frisk All Fully Clothed Adults On The Premises, Where The Officers Are Executing A Search Warrant For Heroin And The Complaint Has Informed Them That Some Or All Of These Persons Are Users And/Or Dealers In Heroin.

When this Court upheld the pat-down search of three possible "stick-up" men based on an officer's *reasonable belief* that they may have been carrying weapons rather than on probable cause, in *Terry* v. *Ohio,* 392 U.S. 1 (1968), the Court observed that " certainly it would be unreasonable to require police officers to take unnecessary risks in the performance of their duties." "American criminals have a long tradition of armed violence and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." 392 U.S. at 23. Later in *Adams* v. *Williams,* 407 U.S. 143 (1972), where an officer had received an informant's tip that a man seated in an automobile nearby had narcotics and a pistol in his possession, this Court upheld the officer's quick search for and seizure of the weapon even though it found that the unverified tip "may have been insufficient for a narcotics arrest or search warrant" and even though the officer could not be certain that the defendant lacked a permit for carrying the weapon. Noting that the officer was operating alone in a high crime area at 2:15 a.m., the Court found that the officer had ample reason to fear for his safety on the basis of the informant's information. 407 U.S. at 147. Of course, once he acted, the officer found not only a fully loaded revolver in the defendant's waist band but also substantial quantities of heroin, a machete and a second revolver hidden in the automobile.

Similarly, in *Pennsylvania* v. *Mimms,* 434 U.S. 106, 98 S. Ct. 330 (1977), this Court held that it was always reasonable under the Fourth Amendment for an officer who has lawfully

detained the driver of an automobile for a traffic violation to order the driver out of the car to establish a face-to-face confrontation and reduce the likelihood that the officer will be the victim of an assault. "We think it too plain for argument that the State proferred justification—the safety of the officer—is both legitimate and weighty." 98 S. Ct. at 333. The Court noted a study which showed approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.

In all of these cases this Court employed a balancing test to determine the reasonableness of the police procedures involved. The balance that was sought was one between the public interest and the individual's right to personal security free from arbitrary interference by law officers. In each of these three cases the requirements of the officers' personal safety were found to outweigh the limited intrusions involved in the frisks or the order to alight from an automobile.

As recognized by many courts and commentators, officers executing a lawful warrant to search for heroin also put themselves in physical danger through the performance of this court-ordered duty. The danger may be even greater than that confronting an officer making a stop on the highway or interrogating suspects on the street. Professor Wayne LaFave in his new treatise, *Search and Seizure* (1978), finds an apt analogy between the *Terry* street encounter situation and the search warrant execution situation where persons are present on the premises to be searched. In noting that the lower courts have required a lesser showing than is required in the *Terry* confrontation that the persons to be frisked in the search warrant situation may be armed and presently dangerous, Professor LaFave observes:

> In weighing the need for a frisk incident to execution of a search warrant, it is appropriate to take account of 'the increased likelihood of danger to the officer *if* in fact the person is armed.' This 'increased likelihood' results in the search warrant situations because more than a 'momentary encounter' is involved, and thus if the person does have a weapon 'he will certainly have much more opportunity to use it against the officer.' The opportunity is greater not only because the suspect and the officer will be in close proximity for a longer period of time, but also—as noted earlier—because the officer's investigative responsibilities under the warrant require him to direct his attention to the premises rather than the person. *Search and Seizure* at § 4.9, pp. 150-151. (Footnotes omitted).

As to frisks in general following any type of stop made by an officer, Professor LaFave notes, apparently with approval, that "lower courts have been inclined to view the right to frisk as being automatic whenever the suspect has been stopped upon the suspicion that he has committed, was committing or was about to commit a type of crime for which the offender would likely be armed, regardless of what the purpose of the weapon might be . . ." *Id.*, Sec. 9.4, p. 116. This principle applies in several categories of serious offenses including dealing in large quantities of narcotics. Sec. 9.4, p. 116.

Many courts have recognized that there is inherent physical danger to police officers in searching or arresting persons involved in narcotics traffic. The United States Court of Appeals for the Second Circuit described firearms as being "tools of the trade" of narcotics dealers in *United States* v. *Oates,* 560 F. 2d 45 (2nd Cir. 1977), and noted that it would be reasonable for a policeman to assume that one of the top narcotics violators in the New York area would be carrying arms or be otherwise be violent in *United States* v. *Santana,* 485 F. 2d 365 (2nd Cir. 1973). In upholding the pat-down of a defendant when he entered the apartment where an illegal drug search was being conducted and drugs had been found, the Supreme Court of Wisconsin noted the increasing numbers of attacks on police officers in recent years and said:

> That fact and the factor of clear and present danger to law officers searching premises, particularly for narcotics, is not to be ignored in evaluating the reasonableness of a precautionary pat-down for weapons under the circumstances before us. A police officer in such circumstances ought not to have to wait until the pistol is pointed and the trigger pulled to have his suspicion confirmed that the person on the premises of a place being searched was armed .... To hold otherwise would be to sign a judicial death warrant for law officers assigned in the future to conduct searches for illegal drugs and certain to encounter the same situation faced by the two Kenosha police officers in this case. *State* v. *Chambers,* 198 N.W. 2d 377, 383 (Wis. S. Ct. 1972).

A year later the criminal court of the City of New York in a narcotics search warrant case where a weapon was discovered on the person of an unknown visitor to the apartment, ruled that:

> It is generally known by the police and others that those who traffic in large quantities of narcotics are often armed. Officer Forte was also apparently cognizant of this possibility when he frisked the defendant 'for my protection' as he testified. The mere presence of a person or persons in such an environment presents that reasonable suspicion and belief which gives rise to sufficient and legal justification to frisk all present for weapons, at the very least. Indeed, the correctness of the belief was borne out by the discovery of a loaded weapon. We cannot, in deciding what is reasonable, close our eyes to the realities of the danger of police duty viewed in the context of such a dire situation. (citation omitted). *People* v. *Finn,* 340 N.Y.S. 2d 807, 816 (Crim. Ct. N.Y., Bronx Cty. 1973)

See Concurring Opinion of Justice Harlan in *Sibron* v. *New York,* 392 U.S. 40, 74 (1968) leaving open the question of automatic frisks in "suspected possession of narcotics cases" but recognizing need for automatic frisks where the nature of the crime creates a substantial likelihood that the criminal is armed.

At least two courts in upholding the propriety of frisks carried out on persons present during execution of narcotics search warrants, have quoted testimony of officers demonstrating that persons arrested for narcotics offenses are frequently armed. In *United States* v. *Mack,* 421 F. Supp. 561, 563 (W. D. Pa. 1976), *aff'd.* 568 F. 2d 771 (Table)(3rd Cir. 1978), the searching officers testimony was that a "high percentage of persons arrested for narcotic offenses in recent years are found to be armed". The court ruled that:

> The Supreme Court in *Terry* v. *Ohio* ... has established the legality of such preliminary searches when the surrounding circumstances are such that the police officers must pursue the investigation without the fear of violence .... In fact the circumstances of this case indicate to the court that the police officers would have been remiss in their duties if they had failed to search defendant. We fail to find any distinction here on the ground that the 'pat and frisk' search in *Terry* v. *Ohio* was done on the streets whereas the search here was done in defendant's dwelling house. The circumstances of defendant's appearance at the dwelling during the search give the police officers the same reason to frisk as they would have in the street situation. 421 F. Supp. at 563.

In *State* v. *Sloughter,* 545 P. 2d, 32 (Wash. App. 1976) an officer executing a narcotics search warrant at the home of a dealer patted down another person present at the time and found cocaine. On the motion to suppress he testified that, among other facts, fifteen to twenty percent of all persons he had arrested for drug related offenses in the past were armed with some type of weapon capable of producing bodily harm, such as a gun, knife or razor blade. The Washington Court upheld the pat-down of the defendant's clothing saying:

> The concern of the court in *Terry* for the protection of an officer in the lawful performance of his duties is even more pertinent today. Since that decision, it is a matter of common knowledge that the incidence of armed violence has dramatically increased. This is not surprising in view

> of the virtually unchecked accessibility to and use of all types of deadly weapons. To require an officer, in the circumstances of this case, to await some furtive movement of the defendant before a protective pat-down search of weapons could take place would compound the officer's exposure to danger.
> 545 P.2d at 35.

Closely analogous to the situation in the present appeal, Arkansas officers executing a search warrant at a bar in which the defendant was employed, having information that substantial amounts of narcotics were dealt at the bar and believing that a majority of the bars habitués were armed, initially secured the establishment and patted down all persons present for weapons. The Supreme Court of Arkansas found this to be a reasonable practice in *Colding* v. *State,* 536 S. W. 2d 106 (Ark. S. Ct. 1976). Several other courts have, without elaboration, upheld the right of police officers executing a narcotics search warrant to pat-down persons present for their own safety. *United States* v. *Branch,* 545 F. 2d 177, 186 note 24 (D.C. Cir. 1976); *Guzman* v. *Estelle,* 493 F.2d 532, 535 note 10 (5th Cir. 1974); *United States* v. *Peep,* 490 F.2d 903, 905 (8th Cir. 1974); *State* v. *Yarbrough,* 552 P. 2d 1318 (Or. App. 1976); *People* v. *Nefzger,* 476 P. 2d 995, 996 (Col. S. Ct. 1970); and *State* v. *Long,* 246 S. E. 2d 846 (N.C. app. 1978), *appeal dismissed,* 248 S. E. 2d 866 (1978 N.C. S. Ct.)[1]

In the last opinion cited above the North Carolina Court of Appeals, in admitting evidence found by air force investigators during a frisk of the defendant conducted just prior to a search of his home, held that "a limited frisk or search for weapons is

[1] Indeed, many decisions cited by appellant for the unreasonableness of searches conducted on less than probable cause, pursuant to an Illinois-type statute, do recognize the validity of a frisk for weapons in narcotics search warrant cases. *State* v. *Mendez,* 565 P.2d 873 (Ariz. S. Ct. 1977); *State* v. *Bradbury,* 243 A.2d 302 (N.H. 1968) *Smith* v. *State,* 289 So. 2d 816, 818 (Ala. S. Ct. 1974).

reasonable and may be constitutionally made of all individuals present in a private residence when the residence is searched pursuant to a valid search warrant based upon probable cause to believe that the residence is the place in which heroin and other controlled substances are bought an sold and that such contraband is then present." 246 S.E. 2d at 851. In reconciling that holding with *Terry* v. *Ohio,* the court stated:

> Although such frisks do not technically constitute a so-called 'stop and frisk' procedure, we find this to be one of those 'carefully defined classes of cases' referred to in *Terry,* which make up an exception to the warrant requirement and that such searches are reasonable. Certainly, if an officer may, without the benefit of either a search warrant or an arrest warrant stop individuals he has observed engaging in unusual conduct on a public street after concluding that they contemplate a crime and are armed as in *Terry,* searches such as those presented by the present case are reasonable and, therefore, constitutional. 246 S. E. 2d at 851.

The same valid reasoning allows that Court's holding on the propriety of limited frisks to be extended also to public places such as the compact one-room neighborhood bar involved in the instant case.

It is relevant to and supportive of the above decisions to note that, of twenty-seven narcotics cases researched and mentioned in this brief, six involved searches which uncovered weapons either on the person involved in the search or on his premises. This amounts to 22% of the 27 cases mentioned. In reviewing the 90 separate Chicago Police Department files where search warrants were executed, mostly for narcotics and related paraphernalia, mentioned in the amicus brief filed by the Americans for Effective Law Enforcement in the present case, Brief at page 11-13, weapons were found by police officers either on a person present during the search or on the premises in 48 of the cases, which is 52% of the total.

A United States Drug Enforcement Administration Study of assaults on its agents between July 1975, and December, 1976, showed that of 72 domestic assault incidents during that time, 25 occurred during the execution of warrants or in related circumstances. Of that 25 almost half, or 12 assault incidents, arose from search warrant or related situations. *Assaults on DEA Agents,* U.S. Department of Justice, DEA, (1978) (excerpts printed in Appendix A to this brief) See Section II.

In their defense lawyers' guide, *Handling Narcotics and Drug Cases,* (1972), F. Bailey and H. Rothblatt, at sections 3 and 5, comment on the desperation of hard drug users to obtain their narcotics and avoid withdrawal effects. In section 6 these two well-known defense lawyers assert that the drug user is "unreliable" as a client and lives in a "fantasy world."

Based upon all the above decisions and information, the State of Illinois requests this Court to analogize the confrontation of police officers executing a search warrant for heroin, amidst persons on the premises where the drug is being sold and/or used, with the on-the-street encounters addressed in *Terry* v. *Ohio.* This Court made a similar analogy once before to authorize a brief stop by roving border patrols in *United States* v. *Brignoni-Ponce,* 422 U.S. 873 81-82 (1975). According to the principles for determining reasonableness used by this Court, the pat-down at issue in the present case was proper. The State's interest in ensuring the safety of the drug enforcement officers, who undertake to execute search warrants for dangerous drugs on premises where many individuals unnamed in the warrant will be present, must outweigh the individuals' interest in not being subjected to a limited intrusion which the pat-down involves. It is possible for an objective standard to be devised which would allow this type of frisk without allowing unbridled discretion in the officers on the scene of a search warrant execution. *Cf. Delaware* v. *Prouse,* ____U.S. ____U.S. ____, 99, S. Ct. 1391, 1396 (1979).

The State asks that this Court allow a limited pat-down search for weapons of all fully clothed persons old enough to carry them on the premises *where a search warrant is being executed for heroin* or similar hard, mind-altering narcotic drugs, where the officers do not have reason to believe that the persons on the scene have no relationship whatever to the premises or to the drugs being sought. Such a ruling by this Court will ratify under Fourth Amendment theory an already existing police practice which does embody neutral criteria and which is essential for safe and effective execution of narcotics search warrants.[2] *United States* v. *Oates,* 560 F.2d at 62; *People* v. *Finn,* 340 N.Y.S. at 813, note 5.

In the present case, application of the *Terry* rule adapted to the execution of search warrants clearly shows that the IBI agents' frisk of all persons at the Aurora Tap on March 1, 1976 was reasonable under the Fourth Amendment. The search warrant issued to the officers was for heroin and other controlled substances, heroin being one of the most dangerous and most valuable of all controlled substances. (A. 5) The agents knew from the complaint that packets of heroin had been seen on the bartender and behind the bar on several occasions and that the bartender, Greg, planned to sell heroin to the informant and most likely others in the tavern on March 1, 1976. (A. 3) When the agents entered the Aurora Tap to execute their warrant there were approximately 12 persons on the premises. (A. 26, 31 and 48) Ybarra was wearing a 3/4 length lumber jacket (as one would expect of most patrons in March).

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[2] See the Drug Agents Guide to Search and Seizure, U.S.D.E.A. (1978), Appendix B to this Brief, p. 83 of the Guide, under the heading "Protective Measures" wherein agents are instructed, subject to Department restrictions, they may do whatever is necessary and proper under the circumstances to execute a warrant, including restricting the movement of persons on the premises to protect themselves and to prevent interference and frisking persons found on the premises.

(A. 31, 57) Only 7 or 8 officers were present when the search warrant was executed on the Aurora Tap. (A. 24; Appellant's Brief p. 9) Under these circumstances it was reasonable for the police officers to believe that, even if some officers were assigned to watch the patrons while others searched, their safety might be endangered by an attack from an unknown user of/or dealer in heroin who would have a weapon and use it in desperation. Of course, if most or all of the persons in this tavern were associated with the narcotics trade and several of them had weapons, it might have been possible for them to over-power and escape from the officers by virtue of their greater numbers and a surprise use of force.

B.

Once Agent Johnson Felt The Cigarette Pack With Objects In It, He Had Probable Cause To Believe Those Objects Were Packets Of Heroin Or Other Controlled Substances And Was Entitled To Seize Them Without A Warrant Due To The Exigent Circumstances.

During the initial frisk of Ybarra, agent Johnson felt something that he described as "a cigarette pack with objects in it". (A. 32) He did not immediately remove this from Ybarra's pocket, apparently because he was still in the process of frisking the other customers. When he had completed this task, he returned to Ybarra, patted him down once again to relocate the objects and retrieved them from defendant's pants pocket. (A. 28-32) On retrieving the objects from Ybarra's pants pocket, Johnson discovered that they were tinfoil packets of the type sought in the warrant. (A. 50)

Having the informant's information that on many occasions he saw tinfoil packets behind the bar at the Aurora Tap and knowing that the bartender promised to sell heroin to the informant on the day of the search, Agent Johnson was entitled to infer that at least some sales of heroin would be made to persons patronizing the Aurora Tap. Once he felt the cigarette

pack with objects in it during the frisk of Ybarra, he could reasonably conclude that such a potential and serviceable drug container [see *United States* v. *Robinson,* 414 U.S. 218, 223 (1973)] was indeed carrying tinfoil packets of heroin which would be or had been sold at the Aurora Tap. These are the identical items sought in the search warrant. Based on these pieces of information and observed facts, a reasonably prudent man would be warranted in concluding that Ybarra had tinfoil packets of heroin in the cigarette pack in his pocket and was thus committing the offense of possession of heroin at that moment and that the object of the search warrant would be defeated unless those packets were retrieved from him. See, *Brineger* v. *United States,* 333 U.S. 160 (1949).

Of course, it is irrelevant whether or not Agent Johnson understood the concept of probable cause at the time he was making the search or whether he was properly lead during his suppression hearing testimony through an analysis of all the various probable cause factors and the basis therefor. The probable cause standard is an objective one to be determined from all the facts of record and those judicially noticed; the determination is one for the court. *Terry* v. *Ohio,* 392 U.S. at 21-22.

> And in determining whether the officer acted reasonably in such circumstances due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. 392 U.S. at 27.

It is true that Agent Johnson was not given the opportunity during direct or cross examination at the suppression hearing to itemize and explain all the factors which gave him probable cause to conduct the second search and retrieve the heroin packets from Ybarra's pocket. Nevertheless, there are enough facts contained in the complaint for the search warrant, in the generally recognized experience of drug enforcement officers as reflected in the myriad of reviewing court decisions and in Johnson's own testimony to warrant this Court's conclusion that

he had probable cause to believe Ybarra was carrying contraband tinfoil packets.

It seems to be the unanimous holding of the judicial authorities considering the question that any contraband discovered as a result of a lawful frisk is seizable without a warrant and admissible into evidence. *Guzman* v. *Estelle,* 493 F. 2d at 534, 536-37, presented the Fifth Circuit Court of Appeals with a situation remarkably similar to the instant one. The Court held that background facts and a frisk of the defendant for weapons which revealed the form of a rubber fingerstall gave the officers probable cause to believe that the fingerstall contained heroin; they were justified in seizing the item under the circumstances, (when time was of the essence) without a warrant. The Court noted at footenote 16 that if the defendant had been detained to prevent the destruction of the contraband found on him while a warrant was sought, this would have amounted to an arrest, a much greater intrusion and an absolute curtailment of his freedom. Other decisions supporting the same conclusions are *United States* v. *Branch,* 545 F. 2d 177 at notes 11 and 24; *United States* v. *Miller,* 298 A. 2d 34, 36 (D.C. Ct. App. 1971); *State* v. *Howard,* 502 P. 2d 1043, 1045 (Wash. App. 1972); *State* v. *Chambers,* 198 N.W. 2d. at 382; *State* v *Yarborough,* 552 P. 2d at 319; *People* v. *Nefzger,* 476 P. 2d at 996; *State* v. *Muckleroy,* 552 P. 2d 257, 258 (Or. App. 1976). See also *Coolidge* v. *New Hampshire,* 403 U.S. 443, 466-67 (1971) (plurality opinion) and id. at 519 (J. White dissenting opinion).

In his treatise Professor LaFave says that while it may be that the issue remains open, lower courts have consistently admitted evidence other than weapons found in a frisk. 3 LaFave, *Search and Seizure,* (1968), Section 9.4 at p. 139-140. He opines that a contrary rule on admissibility would be a serious departure from present law. In its discussion of the purpose and extent of the exclusionary rule in *Terry* v. *Ohio,* 392 U.S. at 13, this Court said:

> The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections.

See also the reasoning applicable to these conclusions in *United States* v. *Robinson,* 414 U.S. at 226, and American Law Institute Model Code of Prearraignment Procedure, Section 110.2(4) and commentary thereon at pp. 121-122 (1972).

Based upon the record and the above authority it is clear that Agent Johnson's search for the seizure of tinfoil packets of heroin was made upon probable cause. Due to exigent circumstances it could be accomplished without the necessity of obtaining another warrant naming Ybarra personally. Consequently, there is no necessity to construe Ill. Rev. Stat. Ch. 38, § 108-9(b) in order to uphold the seizure of heroin from Ybarra and his subsequent conviction. Judicial restraint dictates, therefore, that no decision be made on the constitutionality of the statute since it was applied to a search conforming in every way to Fourth Amendment requirements. *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring.); *Massachusetts* v. *Westcott,* 431 U.S. 322 (1977).

II.

ALTERNATIVE ARGUMENT

ILL. REV. STAT., CH. 38, § 108-9, HAS BEEN CONSTITUTIONALLY APPLIED TO THIS CASE, WHERE THERE WAS A REASONABLE CONNECTION BETWEEN THE AURORA TAP'S CONTINUING OPEN AND NOTORIOUS NARCOTICS VIOLATIONS AND THE PATRONS PRESENT ON MARCH 1, 1976. ILLINOIS' REQUIREMENT OF A REASONABLE BELIEF THAT PERSONS TO BE SEARCHED HAVE A CONNECTION WITH THE PREMISES/ACTIVITY AND A BELIEF THAT THEY MAY CONCEAL OR DISPOSE OF THE WARRANT'S OBJECTS SATISFIES THE *TERRY* BALANCING TEST.

A. Background Of The Illinois Statute And Its Construction

The trial and appellate courts below relied heavily upon Ill. Rev. Stat., (1975), Ch. 38, § 108-9, to justify their decisions in this case. The statute allows officers executing a search warrant to "reasonably detain to search any person in the place at the time: (a) to protect themselves from attack or (b) to prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant." Similar statutes have been enacted in at least 9 other jurisdictions in the United States.[3] The Illinois provision was made part of the Code of Criminal Procedure of 1963 and the Committee Comment following the provision explained its purpose as follows:

[3] Ariz. § 13-1446(E); Conn. Gen. Stat., Rev. § 54-33b, Ga. Code Ann., § 27-309; Kan. Stat., Ann., § 22-2509; Mont. Rev. Code Ann., § 46-5-209 (1978); Nev. Rev. Stat., § 179.055; N.Y. Crim. Pro. Law, § 690.15; Wis. Stat., Ann., § 968.16; D.C. Code (1973), § 23-524(g).

> The need for a search of the person will not usually arise when the parties are before the judge but rather when the officer first arrives at the place where the goods are to be seized. The protection is given in all cases since the danger to be avoided is always present. In addition, it is clear that the purpose of the warrant would be thwarted were not the officer given the second power found in subsection (b), *i.e.*, to search the person for the things to be seized. The need for this power arises most often in narcotics cases where disposition is most easily effected.
>
> 'Any person on the premises' would include the limits prescribed in the warrant itself.
>
> The committee felt that this section is necessary because it gives the officer a clear outline of his power in executing the warrant and removes doubt from a rather cloudy area of the law. Furthermore, if a judge decides there is probable cause for issuing the warrant in the first place, then this power given to the officer which is parasitic to the warrant should not be considered excessive in the hands of the executing officer.
> S.H.A., ch. 38, § 108-9.

It apears that at least five of the jurisdictions that have statutes similar to Illinois' section 108-9 enacted them after 1963, and some of them many years after that time. Arizona, Kansas, New York, Wisconsin and the District of Columbia are all in this category. It is interesting to note that when Wisconsin adopted its version in 1969, the legislative comment following the provision expressed essentially the same reasons as were expressed in the Illinois comment above, although in briefer form. The Wisconsin comment states:

> If this power is not given, the effectiveness of a search warrant may be thwarted by a person or persons on the premises searched by concealing, on their person, the items subject to seizure.
> Wis. Stat., Ann. § 968.16.

Additionally three states have granted officers executing a search warrant powers almost identical to those contained in

the Illinois Statute by providing the power in the established form of warrant itself, rather than in a separate enabling statute.[4]

As the Supreme Judicial Court of Massachusettes said in *Commonwealth* v. *Smith,* 348 N.E. 2d 101, 103 (Mass. 1976):

> "There is no general agreement in either holding or reasoning among the courts which have considered whether the search of any person present pursuant to a valid premises search warrant is a reasonable search under the Fourth Amendment."

Professor LaFave notes in his treatise *Search and Seizure (1978),* Vol. 2, § 4.9(c), that some courts have struck down searches which had been predicated upon the warrant powers cited above as being unconstitutional general searches, while other courts have upheld such searches under the statutory power conferred. LaFave believes that these apparently contradictory decisions can be reconciled upon closer examination of their facts. He maintains:

> The principle which emerges from these decisions is that it is not constitutionally permissible 'to search a person, not connected in any way with the place being searched, who merely happens to be on the premises and who is not mentioned or described in the affidavit of probable case upon which the warrant was issued'. Rather, 'the law requires that there be probable cause to believe that such persons are themselves participating in criminal activity' or, somewhat more precisely, that there be probable cause that evidence which might be concealed or destroyed is to be found upon the person searched.
> *Search and Seizure,* Vol. 2, § 4.9(c) at p. 144.

Appellee agrees from a survey of the decisions that the courts upholding searches pursuant to a provision such as Illinois'

[4] Del. Code Ann., Title 11, § 2310; Mass. Gen. Laws, Ann., ch. 276, §2A; N.H. Rev. Stat., Ann. §696-A:3.

§ 108-9 have required a connection between the persons to be searched and the place mentioned in the search warrant. However, such decisions have *not always required probable cause* to believe that such a connection exists or that the persons on the premises were involved in the criminal activity to which the warrant is directed.

The State of Illinois submits that under circumstances where these statutory powers are being employed by drug enforcement officers during search warrant raids on premises where hard narcotics are being sold, it is not necessary that there be full traditional probable cause to connect unknown persons on the premises to the persons or things to be searched by warrant, in order to constitutionally justify searches of the unnamed persons.

The Illinois Supreme Court has not as yet authoritatively construed Chapter 38, § 108-9. Illinois Appellate Court decisions which have construed the statute are of rather recent vintage and are all agreed that the statute does *not* authorize the search of any person found on any premises where a search warrant is being executed regardless of the circumstances. Illinois courts have been sensitive both to the constitutional danger of allowing the statute to transform otherwise valid specific warrants into general warrants and to the legislature's concern that objects sought by warrant will avoid discovery if persons on the premises are immunized from search in all but the most obvious cases of complicity.

In its opinion in the present case the Illinois Appellate Court, Second District, indicated that there were decided limits on the use of section 108-9(b), when it stated that it would not authorize a blanket search of persons or patrons found in a large retail or commercial establishment. The court pointed out in the present case that the search was conducted in a one-room bar where it was obvious from the complaint of the officer seeking the search warrant that heroin was being sold or

dispensed. The court reiterated that each case must be decided upon its own facts. Finding a reasonable application of the statute in this case, the court therefore held that section 108-9 was not unconstitutional in its application to the present facts. (Opinion at A., pp. 84-87)

Two years ago the Illinois Appellate Court, First District, in *People* v. *Dukes,* 363 N.E. 2d 62 (Ill. App. 1977), held that § 108-9 did not authorize the search of persons "on the premises described in the warrant without some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." 363 N.E. 2d at 64. The Court ruled that the statute could not be used to sanction automatic searches of any person who may happen upon the premises during execution of a warrant because such an interpretation would afford no protection to innocent strangers having no connection whatsoever with the premises. In that case the defendant had knocked on the door of an apartment being searched pursuant to warrant for gambling material. The same court most recently in *People* v. *Gloria Miller,* ____ N.E. 2d ____, (1st Dist. Ill. App., June 25, 1979) (see opinion attached hereto as Brief Appendix C) construed section 108-9 more explicitly in light of this Court's decisions in *Delaware* v. *Prouse,* ____ U.S. ____, 47 U.S.L.W. 4323, 99 S. Ct. 1391 (1979) and *Terry* v. *Ohio,* 392 U.S. 1 (1968). Applying the test of balancing the intrusion on an individuals Fourth Amendment interest with the promotion of a legitimate government interest, the appellate court construed the statutory language "reasonably detain to search" to require that the executing officer be able to express at least an articulable and reasonable suspicion that either a search or a detention (or both) is for a purpose enumerated in § 108-9. The court also held that the power allowed by the statute to prevent destruction or concealment of items called for in the search warrant must be strictly limited to allow the search of only those persons on the

premises at the time the warrant was executed. In this case the search had already been completed when the outsider arrived. The *Miller* decision also followed *People* v. *Dukes* in requiring that the record show an indication that the officers knew the defendant had a sufficient connection with the premises to justify the search.

The Illinois Appellate Court, Third District, imposed similar limitations on § 108-9 in *People* v. *Boykin,* 382 N.E.2d 1369 (3rd Dist. Ill. App. 1978). There the court upheld the search of a person found in a residence during the execution of a search warrant, a person who had attempted to flee when the police entered the premises. The court specifically recognized

> "that section 108-9 cannot be read to authorize a routine search of anyone who happens to be on the premises regardless of circumstances. (*People* v. *Ybarra,* [citation omitted]; *People* v. *Dukes,* [citation omitted].) This section does authorize searches where it is shown that the person searched has some connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." 382 N.E. 2d at 1372.

It is important to note that this appellate panel cited the appellate court opinion in the present case as supporting the proposition that 108-9 must be read with certain limitations.

It is thus clear that the Brief Amicus Curiae of the State Public Defender of California in support of appellant is incorrect when, at page 4, it alleges that the Illinois court has authoritatively construed this statute to vest absolute discretion in searching officers to search any person present on premises described in a warrant regardless of the circumstances. Such a statement completely ignores not only the circumspect language of the decision below but also the very clear limitations imposed on the statute by other Illinois courts in recent months. Nevertheless, it is true that the Illinois opinions cited above

have not mentioned a requirement of probable cause to believe that a person on premises being searched under a warrant is concealing or destroying items sought in the warrant. Instead, the Illinois courts talk of the need for a "reasonable suspicion" or "reasonable belief" that such activity is occurring along with a reasonable belief that there is some connection between the person to be searched and the premises.

B. Judicial Authorities From Other Jurisdictions.

The decisions of other state courts interpreting similar statutory provisions have also refused to require full traditional probable cause in order to search a person present on, and connected with the premises listed in the warrant. The Court that has most frequently done so (contrary to the contention of the California amicus brief, supra) is the Georgia Court of Appeals. Recently in *Campbell* v. *State,* 228 S. E. 2d 309 (Ga. App. 1976), U.S. appeal dismissed, 429 U.S. 1083 (1977), the court held that where police armed with a warrant made a drug raid on a residence containing several persons not named in the warrant, there was a valid search of Campbell revealing a small plastic bottle containing cocaine. Discussing the very similar Georgia statutory provision, Code Ann. § 27-309, the court ruled that it allowed a very limited search of persons present on the premises at the time of the search, only to look for weapons or for the items particularly described in the warrant. During a pat-down search the police found a small plastic bottle in the defendant's right-hand pocket. "Whether or not that bottle could be removed from defendant's pocket depended upon whether police reasonably believed that this bottle contained cocaine." The court ruled that under the circumstances here, involving continuous useage, sale and storage of cocaine on the premises, that the police did have a reasonable belief that Campbell's bottle contained cocaine.

This decision is notable also because it is apparently the only other one on the subject that has ever given rise to a direct

appeal to this Court alleging an unconstitutional interpretation of its state's warrant powers statute. However, the appeal was dismissed on February 22, 1977 for want of jurisdiction and certiorari was then denied.[5]

The Supreme Court of Kansas has also upheld a statute identical to Illinois' Section 108-9, interpreting it to allow only reasonable detention and search of a person under the conditions specified. *State* v. *Loudermilk,* 494 P.2d 1174 (Kans. S. Ct. 1972). The Kansas court held that the search warrant issued to seize opium and related instrumentalities from a building where agents had seen opium users coming and going established probable cause to believe that opium was concealed either on the premises or on the persons of those present.

> Narcotics such as heroin, are easily concealed on a person and may readily be disposed of. Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable but necessary to secure effective enforcement of the Uniform Narcotic Drug Act.
> 494 P.2d at 1178.

The District of Columbia Court of Appeals in applying Section 23-524(g) of the D.C. Code of 1973 has in two decisions allowed the use of evidence obtained from the search of a person on premises which were examined pursuant to a warrant, on both occasions for gambling equipment and paraphernalia. *United States* v. *Graves,* 315 A.2d 559 (D.C. Ct. of

[5] The question presented in the jurisdictional statement in the *Campbell* appeal was "may a statute pertaining to execution of warrants be held constitutional if it is construed to authorize routine weapon searches in absence of factors required for pat down, and to authorize extension of search expressly permitted by warrant to visitors on described premises in the absence of probable cause to arrest or search such visitors?" 45 U.S.L.W. 3518.

Appeals 1974); *United States* v. *Miller,* 298 A.2d 34 (D.C. Ct. of Appeals 1971). In neither decision did the Court of Appeals require probable cause to believe that persons not named in the warrant but present on the searched premises were carrying objects sought in the warrant. In *Graves* the court noted that an informant had told officers just prior to the execution of the warrant that the people were inside that had the numbers slips on them; the court interpreted this as allowing the officers to reasonably believe that all the persons inside were involved in the gambling activity. The obviously reasonable limitations on the authority to search persons present on the premises being searched pursuant to a warrant were recognized. However, the court found that the search was not unreasonable under the Fourth Amendment and said "We do not believe on these facts that a suspect should be allowed to circumvent a warrant to search premises by the simple device of picking up the illegal object and holding it in his hand or by placing it in his sock. We know of no rule of law that requires such result." 315 A.2d at 561. The court noted there was no indication in the record that any of the people present had been in the searched delicatessen in order to shop.

In *Miller* the police sought to execute a warrant seeking gambling paraphernalia at an after hours bar. When the door was not opened at their request and running was heard inside, they forced the door and patted down approximately 20 persons present to determine if anyone had weapons or gambling paraphernalia. This search revealed a tinfoil packet of narcotics. The court held that the previous finding of probable cause exemplified in the warrant and the reactions of those in the bar when the search was announced combined to give the police "reasonable cause to believe that the occupants possessed, concealed and were about to remove or destroy the evidence for which they had a search warrant." "This belief

alone gave the officers sufficient ground to search the individuals present. *Nix* v. *United States, supra.*"[6] 298 A.2d at 36.

The Supreme Court of Florida held in the case of a gambling raid made pursuant to search warrant in *Samuel* v. *State,* 222 So.2d 3 (Fla. S. Ct. 1969) that the failure to name all the persons to be found on the premises did not make the warrant invalid to authorize the search of such persons. The warrant authorized the search of the building as well as "the person or all persons therein who shall be connected with or suspected of being connected with the operating or maintaining of said gaming or gambling games, devices, equipment and paraphernalia." The court held:

> We think that the section 22 organic requirement [similar to the Fourth Amendment] is satisfied when the judicial determination is made that there is probable cause to believe that the premises are being used for an illegal purpose such as gambling; and that it is entirely reasonable and proper to search persons found on such premises when there are reasonable grounds to suspect—that is believe—that such persons are engaged in or connected with the unlawful activities that are the subject matter of the search. (citations omitted)
> 222 So.2d at 5.

The Supreme Court of Washington made a similar statement in *City of Olympia* v. *Culp,* 240 P. 360, 361-62 (1925) qualifying the right to search persons found on the premises by the

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[6] In this Opinion, the court uses "good cause" and "reasonable cause" interchangeably but speaks of "probable cause" needed for issuance of the underlying warrant. Appellee submits that, in the context of search and seizure, reasonable cause is not as high a standard as probable cause. For example, paraphrasing the lesser standard for stops formulated by *Terry* v. *Ohio,* this Court's Opinion in *U.S.* v. *Brignoni-Ponce,* 422 U.S. at 881-3, uses interchangeably the words "reasonable belief," "reasonable grounds" and "reasonable suspicion." "Reasonable cause" also carries the same meaning as the Terry formulation.

requirement that officers have "reasonable cause to believe" that the persons have articles for which the search is instituted. The words probable cause are not used. The court also said

> Officers making a search of premises under a search warrant may lawfully detain all persons found therein until the search is concluded. Any other rule would frustrate the purposes of the search; the officers would be compelled to stand idly by while the articles for which the search was instituted were carried away.

See also, *VanHorn* v. *State,* 496 P.2d 121, 123 (Okl. Cr. App. 1972) agreeing with the above formulation; *Brown* v. *State,* 498 S.W.2d 343 (Tex. Ct. App. 1973); Drug Agents Guide to Search And Seizure, U.S. D.E.A. (1978) p. 79-80.

Although several state courts have construed their warrant forms or statutes similar to Illinois' Section 108-9 to require full probable cause for the search of unnamed persons on the premises when a warrant is being executed, e.g., *Commonwealth* v. *Smith, supra,* at least six of the decisions cited as being on point by appellant and by the California State Defender *do not* stand for this proposition.[7]

[7] *Willis* v. *State,* 177 S.E.2d 487 (Ga. App. 1970) is not inconsistent with the *Campbell* decision cited above since it upheld search of persons as being reasonable under the Georgia statute when they were gathered together in an apartment where drugs were in a container on a table within easy reach of all of them. The court makes no mention of probable cause in the decision and indeed describes the evidence for the personal search as being "skimpy and marginal [but] sufficient to support the search under the warrant charging a possessory offense and in accordance with Code Ann. Section 27-309 (b)." 177 S.E.2d at 490. Similarly, *State* v. *Cochran,* 217 S.E.2d 181 (Ga. App. 1975), which invalidated the search of individuals in an automobile leaving the premises about to be searched under a warrant "to search . . . the places and persons for the property specified" described as "illegal drugs and narcotics" in "automobiles, on persons and in two buildings located on the premises and curtilage known as the Sunshine Club," held that the search warrant was a general one. There was no limitation in the Cochran warrant, unlike

(footnote continued on next page)

The only authority from this Court which has been quoted as bearing directly upon the present issue is the decision in *United States* v. *DiRe,* 332 U.S. 581 (1948).[8] In that case the government claimed that the search of an automobile passenger

(footnote continued from preceding page)

the warrant in *Willis* and the Illinois statute, limiting it to persons who reasonably might be involved in the unlawful activity. Additionally, the court did not reach the issue of whether the warrant would have been valid as applied to the building housing the Sunshine Club under the circumstances.

The decision in *United States* v. *Branch,* 545 F.2d 177 (D.C. Cir. 1976) noted the difficulty of the present issue but never considered or decided it because the government never made the argument. In *United States* v. *Micheli,* 485 F.2d 425 (1st Cir. 1973) the court in dicta described the rules at either end of the premises search spectrum but did not discuss or confront the persons-on-premises search question presented in this case; the court did, however, allow the search of an unnamed person's briefcase when it had been left on the premises to be searched and the individual was connected with the premises. *McAllister* v. *State,* 306 N.E.2d 395 (Ind. App. 1974) was decided primarily on state procedural grounds involving the failure to incorporate the complaint for search warrant in the body of the warrant itself. The decision in *State* v. *Bradbury,* 243 A.2d 302 (N.H. S.Ct. 1968) is not inconsistent with the rulings of the Illinois courts. The decision invalidated a search of another student found in the dormitory room of an individual who was alleged in the warrant to be keeping marijuana. The court invalidated the search because there was no connection in any way between the individual searched and the place being searched, the indication was that the individual simply happened to be on the premises. The Illinois decisions cited above also require some connection with the premises shown either in the complaint for search warrant or in circumstances occurring at the time of the search.

[8] *Sibron* v. *New York,* 392 U.S. 40 (1968) did not decide any question presented by the instant appeal. Sibron's case was decided on the basis of no probable cause to arrest him and no legitimate suspicion that he was armed or was dealing in narcotics. Justice Harlan even stated that the eight-hour police surveillance had "pointed away from suspicion" of Sibron rather than adding to it. 392 U.S. at 74.

was justifiable as being incident to the right to search the vehicle on probable cause, without a warrant. Yet the government conceded that if an officer was armed with a search warrant for a residence only, he could not search all persons found in that residence. The Court naturally responded negatively to the suggestion that power not allowed to an officer under a warrant could be allowed in a situation of a search without a warrant. This Court did invalidate the thorough search of the passenger in the car where the informer had disclosed counterfeit government coupons, saying:

> We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.
> 332 U.S. at 587.

However, the Court did not decide whether, without Congressional authorization, any automobile is subject to search without warrant on reasonable cause to believe that it contained contraband. There seemed to be great importance ascribed to the fact that in DiRe's case there was no search of the automobile itself and indeed the automobile search doctrine appears to have been simply a pretext on which to search the passengers personally. Importantly, in discussing the doctrine of *Carroll* v. *United States,* 267 U.S. 132 (1925), the Court again held that permitting warrantless searches of automobiles was consistent with the Fourth Amendment primarily because it was in response to the dictates of an Act of Congress. The Court stated:

> Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the act was, therefore, unconstitutional. In view of the strong presumption of constitutionality due to an act of Congress, especially when it turns on what is "reasonable", the *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are

> subject to search without warrant in the enforcement of all federal statutes.
> 332 U.S. at 585

In the instant case, the General Assembly of Illinois has decided that it is reasonable for officers executing a lawful search warrant to be able to detain and search persons on the premises under reasonable circumstances, especially in narcotics cases. The above dicta in *DiRe* is more supportive of the State's position in the present case than the dicta cited by appellant is destructive of that position.

C. The Important Governmental Interests In Controlling Narcotics and Encouraging Use of Warrants.

In addition to the dictates of common sense, there are, as mentioned above, a goodly number of courts and legislatures that have agreed with the Illinois General Assembly that the urgency of controlling the narcotics traffic and the every-day street realities of that nefarious business require giving officers executing search warrants the power to search unnamed persons on the premises, when there is a reasonable belief that they are connected with the unlawful activity and may be concealing or carrying away the contraband.

> It is well to remember that Congress itself has found that:
> "the illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.... Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.... Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."
> 21 U.S.C. §§ 801(2), (4) & (6).

The Second Circuit Court of Appeals, in upholding the stop of travelers in a narcotics smuggling case on the basis of a need to stop, has described the traffic in the following terms:

> "A significant portion of that need is supplied by the inherent odiousness and gravity of the offense, the societal costs of which, in terms of ruined and wasted lives, are staggering".
> *United States* v. *Oates,* 560 F.2d at 59.

The legislatures of several states (see footnote 3) and the courts of Kansas, the District of Columbia, and Washington cited above have all explicitly stated the need for officers searching under a warrant to have the power to search persons on the premises lest the warrant be made a mockery through the concealment of the objects sought. In *State* v. *DeSimone,* 288 A.2d 849 (N.J. S.Ct. 1972), Chief Justice Weintraub described this as being a power needed by the government to deal with crime.

Professor LaFave in discussing the Illinois statute in a law review article, "Search and Seizure: 'The Course Of True Law . . . Has Not . . . Run Smooth' " 1966, Ill.L.Rev., p. 266, 272 states:

> It is submitted that a realistic appraisal of the situation facing the officer executing a search warrant compels the conclusion that *under some circumstances* a right to search occupants of the place named in the warrant is essential. The unresolved question is what connection must exist between the person and the premises and what other circumstances must be present to justify such action.

LaFave concludes that there must be probable cause to search a particular individual who is found at a place where a search warrant is about to be executed, but he admits that there is a problem where probable cause is lacking and yet persons on the premises may be concealing items sought in the warrant. In his treatise *Search and Seizure,* Vol. 2 at Section 4.9, p. 147, he asks "Are the police powerless to take any steps at all to foreclose the risk that the person may depart the premises with critical evidence concealed on his person?" Put differently, is there any practical step officers can take other than what the

I.B.I. agents did in the instant case? The only light LaFave sheds on the subject is contained in a quotation from *United States* v. *Festa,* 192 F. Supp. 160 (D. Mass. 1960). The court there speculated that it might be permissible for an officer executing a warrant aimed at an easily-concealed type of property to order a person on the premises to remain until the officer can be certain that the detainee is not engaged in removing the property specified in the warrant. See also *State* v. *Wise,* 284 A.2d 292, 294 (Del. S. Ct. 1971). LaFave finds this to be a very persuasive suggestion, especially in light of this Court's subsequent decision in *Terry* v. *Ohio.*

The State of Illinois suggests that the mere ability to detain a person on the premises to interrogate him and investigate the possibility that he may be concealing narcotics mentioned in the warrant is hardly ever sufficient to create probable cause to either excuse the detainee or to search his person. Even if a fairly prolonged detention on the spot did not constitute an illegal arrest (which this Court's decisions have given every reason to believe it does), nevertheless, an officer's ability to question or investigate experienced traffickers in hard drugs, who have undoubtedly learned to be discreet about their activities, will haruly ever yield definite information to give probable cause for believing that specific drugs are concealed on an individual person. The suggestion in *United States* v. *Festa* being entirely impractical in narcotics cases, if a hard and fast probable cause rule is imposed on the search of persons not named in the warrant, there can be no resolution of Professor LaFave's question. Many of the circumstances in which he sees an essential right to search occupants of the place named in the warrant will then not be recognized in the law.

The facts of the present case are illustrative of the problem. The officers executing the instant search warrant for the Aurora Tap had information (already accepted by an impartial issuing judge) that tinfoil packets had frequently been seen behind the

bar and on the person of the bartender Greg by the informant, a patron of the tavern. (A. 3) The complaint stated that the bartender was going to be selling packets of heroin at the bar on March 1, 1976. (A. 3) Contained within the informant's affidavit was the undeniable inference that some patrons of the small tavern were the intended purchasers of the heroin sought in the warrant and, perhaps, were even dealers themselves. The patrons in the tavern while the warrant was being executed were most likely people who frequented the neighborhood establishment; they were connected with the tavern by their choice to be present in a place where possession and sale of narcotics were rather open and nortorious. (A. 2-3) The IBI agents clearly had a reasonable belief or suspicion that some or all of the patrons would have concealed on their persons some portion of the substances sought to be recovered in the warrant.[9] And yet under traditional probable cause standards, it might not be said that the police had probable cause to believe that any specific individual in the Aurora Tap was concealing heroin in tinfoil packets on his person, since no activity was observed by the police as they entered and no actions were taken by the patrons which would shed any light on their involvement during the initial minutes of the search warrant execution. If, contrary to the Illinois statute and the decisions of Illinois courts, the officers were unable to follow through on their reasonable belief that search objects were being concealed by some or all of the patrons and if they were not permitted to even pat down the patrons as part of the execution of the warrant, it is logical to expect that some or all of the patrons would have walked out of the tavern with some or all of the objects of the warrant in their possession. Nothing that the agents could have done, short of the greater intrusion of lengthy detention amounting to arrest or of detailed physical exam-

[9] The Return filed with this search warrant indicates that other patrons besides Ybarra were found to be concealing narcotics paraphernalia, i.e., hypodermic needles, and marijuana. (A. 7).

ination, would have informed them which of the patrons to search under a probable cause standard.

With no legal alternative for discovering objects of the search warrant concealed in patrons' clothing and given sanctuary there by a stiff probable cause standard independent of the warrant, the officers would undoubtedly have felt that their efforts and the warrant's purpose had been defeated to a great extent. The value of the search warrant would have seemed diminished, if not obliterated, in their eyes. As Chief Justice Weintraub said in the course of his decision in *State* v. *DeSimone, supra:*

> Needless to say there is no official arrogance when the officers place the facts before a magistrate for his view rather than search and seize upon their own assessment of the factual pattern when it accrued. Since it furthers the constitutional purpose to encourage applications to a magistrate [for a search warrant], we should take a view of the problem which will make that course feasible.
> 288 A. 2d at 851.

Unrealistic limitations on the execution of search warrants, if they endanger the officers' safety or obstruct and defeat the narcotics warrant's purpose, will definitely discourage applications to magistrates by drug enforcement officers for search warrants involving places where strangers may be found, which is to say, everyplace drugs are peddled.

D. Application of the Balancing Test Yields A Rule of Reasonableness Governing Personal Narcotics Searches Incident to Execution of Search Warrants:

To prevent such an unhappy turn of events and to encourage the use of judicially scrutinized and authorized search warrants for narcotics on premises where strangers will be found, this Court should employ the *Terry* balancing test to allow searches of persons on compact premises specified in the warrant, when there is information that drug trafficking is

taking place at that location and the police have a *reasonable belief* that the persons present are connected with the criminal activity and are likely to be concealing the objects of the warrant in their clothing.

Applying the analysis used by this Court to permit searches on less than traditional probable cause in *Terry* v. *Ohio,* 392 U.S. 1, *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975) and *Marshall* v. *Barlow's Inc.* 98 S. Ct. 1816 (1978), it is first noted that the governmental interests to be served by the ruling suggested are extremely strong. In line with the findings by Congress cited above in 21 U.S.C. § 801 and echoed in the enactments of every legislature in the nation, the Executive Branch of each government has an important interest in effectively controlling traffic in dangerous, hard drugs especially heroin. At the same time, the Judicial Branches of our governments have an interest in preserving the integrity and effectiveness of the search warrant, an interest which can be seen reflected in the many decisions over the past 20 years strengthening the warrant clause of the Fourth Amendment.

Balanced against these interests are the individual's concern with his privacy and his desire to avoid the indignities of personal searches. However, in the circumstance where an individual willingly enters a place where narcotics possession and/or sales is open and nortorious, there can be no realistic expectation that law enforcement authorities may not subject the individual to some inconvenience as a result of his choice. Appellee submits that only a minimal amount of inconvenience would result from the slight intrusion of a brief pat-down to discover forms in an individual's clothing which would give probable cause to believe he was carrying illicit drugs.

Clearly, the balance swings heavily toward the two governmental interests which would be served by a rule of reasonableness. Should the result required by balancing societal

interests here be different than it was in *Adams* v. *Williams*, 407 U.S. at 147, where this Court approved a quick search of a man sitting peacefully in his car at night based upon an informant's tip that the man was carrying narcotics and a pistol, information that may not have been sufficient for a search warrant? Should the result be different than it was in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, where this Court approved limited investigative stops of unknown automobiles by roving border patrols in the border area, on reasonable suspicion that they might be carrying illegal aliens? Is it less reasonable in defining Fourth Amendment standards to accommodate the practicalities of government efforts to control the dangerous, debilitating narcotics traffic than to accommodate the realities of building code enforcement as did *Camara* v. *Municipal Court*, 387 U.S. 523?

Illinois submits that the twin governmental interests in the present situation are just as strong as those in the cited cases and that the inconvenience to or intrusion on bar patrons is no greater than the intrusions approved above. Therefore, the balancing test must yield the same result in the circumstances of the present narcotics search warrant case. A pat-down of patrons who are found on compact premises, are reasonably believed to have a connection with the premises or the criminal activity and are reasonably believed to have concealed in their clothes the objects of the narcotics search warrant should be allowed under the Fourth Amendment.

Ill. Rev. Stat., Ch. 38, § 108-9, as construed allows no broader searches of persons on premises which are being searched under warrant than is justified by the above balancing analysis. The statute was therefore constitutionally applied to

the facts of this case and Ybarra's conviction should be affirmed.[10]

[10] The same result can be reached in this appeal without removing the requirement of probable cause to search individual patrons on the premises, if the quantum of information and the degree of certainty required for probable cause in this situation is lessened, as in *Camara* v. *Municipal Court, supra.* Professor LaFave discusses the concept of a variable test for probable cause and presents approaches to that concept which could be used to find that the IBI agents in the present case *did* have probable cause to conduct a pat-down search of all patrons in the Aurora Tap for the objects specified in the search warrant. 1 LaFave, *Search and Seizure* (1978), § 3.2(a) and (e).

CONCLUSION

Whether this Court views the present appeal as one involving a frisk yielding probable cause to search for contraband or as a simple search incident to the execution of a narcotics warrant and pursuant to proper statutory authority, the search of appellant was proper under the Fourth Amendment. The statute attacked by appellant, if it had any effect on the outcome of his motion to suppress in light of *Terry* v. *Ohio,* was constitutionally applied by the court to the facts of his case. Appellant's conviction should be affirmed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General
State of Illinois

DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General
188 W. Randolph St. (Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Attorneys for the Appellee.

BRIEF
APPENDIX A

BRIEF APPENDIX A

ASSAULTS ON DEA AGENTS

A Description and Analysis of Domestic Assault Incidents
(July, 1975 through December, 1976)

Prepared by:

Statistical and Data
Services Division
United States Dept. of Justice
Drug Enforcement Administration

INTRODUCTION

Purpose

This study was undertaken in an attempt to provide DEA management and Agent personnel with the most comprehensive data available regarding the conditions and circumstances surrounding assault incidents. The report's primary purpose is to provide descriptions and analyses of identified assaults which will prove beneficial in reducing both the risks involved and the number of assaults that occur during the course of investigative and related activity.

Sources

In order that all assaults would be accounted for, the scope of the data base employed for this report has been expanded over that of prior DEA assault studies. For this reason, no statistical comparisons or analyses of trends between this and preceding studies will be presented.

To insure total assault coverage, three sources have been utilized. The first of these is the "Discharge of Firearms" file maintained by the Office of Internal Security. This file contains accounts of all reported discharge of firearm incidents by Agents as well as several other assault incidents. The available listings were furnished to the appropriate Internal Security Field Offices and verified as accurate and complete. Second, the "Assaults on Agent" File maintained by the Investigative Records Section was searched. This file is a compilation of random assault incidents frequently unrelated to a specific investigation. Third, the Monthly Report of Assaults (DEA 346) submitted by each region was also utilized. Each individual region was then queried and asked to verify in writing regarding the actual number and corresponding case file listing of assault incidents reported on the DEA 346. It is believed that these sources encompass all domestic assaults occurring during the July 1, 1975—December 31, 1976 time

frame. Furthermore, to insure that the data contained in the above sources was not misleading, the corresponding case file in which an assault was identified was also studied.

Definition

As previously noted, the sources utilized provide an inclusive listing of assault incidents, ranging from assaults directly related to specific investigations to those related to various other aspects of enforcement activity. In an effort to provide a comprehensive insight into the nature of these occurrences, no identified assaults, with the exception of a limited number of incidents clearly beyond the scope of investigative activity, were omitted. Specific categories have been established to distinguish between the various types of assault situations.

With this in mind, a definition of what constituted an assault was formulated. Within the scope of this study, an assault is defined as the intentional or attempted use of physical force or weapon against a DEA Agent.[11] It should be noted, however, that in a number of situations a defendant injured or attempted to injure more than one Agent. For example, in one particular situation a defendant physically struck a State and Local Officer who was attempting to arrest him and then, moments later, struck another State and Local Officer. For purposes of this study, this is counted as one assault incident rather than two assaults.

* * *

[11] Unless otherwise specified, a DEA Agent also includes Task Force, other Federal and State and Local Officers.

I. STATISTICAL BREAKDOWNS

Total Assaults Over Time

A total of seventy-two domestic assault incidents occurred during the July 1, 1975, thru December 31, 1976, time frame. It is significant to note that of the seventy-two incidents, thirty-nine took place during the last six months of CY 1975 while only thirty-three occurred for all of CY 1976. If 2nd half CY figures are prorated to include the entire calendar year,[12] the resultant seventy-eight assaults would indicate a decrease of 58% in total assaults from CY 1975 to CY 1976.

* * *

Situation

By far, the most dangerous segment of an investigation is the arrest situation. Approximately 95% of all assaults occurred as an arrest was being made.[13] For purposes of this study, the arrest situation has been subdivided into two categories: (a) arrests in conjunction with a purchase of evidence and, (b) arrests in conjunction with the execution of warrants and similarly related circumstances. Both categories were equally divided (25 each) regarding the number of assault incidents.

Quite surprisingly, the number of robbery assaults during a purchase of evidence was extremely low (4). Furthermore, it should be noted that all four assaults occurred during the last six months of CY 75. No robbery assaults were recorded for the entire CY 1976.

[12] As previously mentioned, data base dissimilarities between this and prior DEA assault studies prohibit comparison of statistics.

[13] However, in the execution of warrants category of assaults almost half initially involved execution of search warrants or other searches, i.e. 10 or 12 of the 25 assault incidents studied. (This footnote added by the State of Illinois.)]

Assaults of all remaining classifications, with the possible exception of one category,[14] were minimal.

Situation (July 1, 1975-Dec 31, 1976	# of Assault Incidents
Arrest (execution of warrants and related circumstances)	25
Arrest (purchase of evidence)	25
Robbery (during purchase of evidence)	4
Surveillance	2
Compromise of Identity	2
Other (non-case related)	10
Other (case-related)	4
Total	72

Location of Assaults

Attempts to arrest defendants while they were seated in our behind the wheel of an auto precipitated the highest number of assault incidents. Invariably, in the majority of these cases, the defendant was attempting to escape and, in so doing, struck the officer with his vehicle.

Statistics reveal that assaults occurred in the following locations:

Automobile	— 27
Open Area	— 20
Private Residence	— 13
Other	— 10
Hotel/Motel	— 2
Total	72

Defendant Weapons

The firearm was the weapon used in nearly 38% of all assault incidents. Physical attacks and assaults involving the use of automobiles ranked second with identical numbers of assault incidents, eighteen each. A fourth category identifies

[14] See Section VII, (other non-case related assaults).

four incidents in which an unarmed defendant struggled for possession of the Agent's service revolver.

Weapon	# of Assault Incidents
Firearm	27a
Auto	18
Physical Attack	18
Struggle for Agent's Service Revolver	4
Knife	2
Other	3b
Total	72

a. One incident involved the use of both a firearm and knife.

b. Other weapons: (1) chemical substance; (2) bottle; (3) attache case.

* * *

Primary Drugs Removed

Of the fifty-eight assault incidents directly related to an ongoing investigation, heroin or cocaine was the primary drug removed or negotiated for in thirty-nine or 67% of the investigations. Although a review was initiated, no determination could be made as to whether or not drug type was a contributing factor in the assaults studied.

Primary Drug Removed/Negotiated	# of Cases	%
Heroin	21	36%
Cocaine	18	31%
Marihuana	5	9%
PCP	4	6%
Amphetamine	3	5%
LSD	3	5%
Methaqualone	1	2%
Quaaludes	1	2%
Methamphetamine	1	2%
Hashish	1	2%
Total	58	100%

II. ARRESTS (EXECUTION OF WARRANTS AND RELATED CIRCUMSTANCES)

Description

Location of Assault

Thirty-five percent of all assaults occurred as Agents were executing arrest/search warrants or engaged in similarly related circumstances. Of these, ~~eig~~hteen of the twenty-five assault attempts took place in either a private residence or automobile. A breakdown of the location of assaults is as follows:

Location	# of assaults	Percent
Private Residence	10	40%
Automobile	8	32%
Open Area	3	12%
Other	4	16%
Total	25	100%

Type of Assault

A strong correlation exists between the location of the assault attempt and the weapon utilized. Of the ten assaults occurring in a private residence, a firearm was the primary weapon employed in six incidents while, in two other occurrences, unarmed defendants struggled for possession of the Agents' service revolver. In each of the eight attempts to arrest a defendant in an auto, the auto itself was the instrument utilized as a weapon. As previously mentioned, the defendants were invariably attempting to escape and, in so doing, struck the officers with their vehicles. It should be noted that in four incidents the arresting officers did not set out to arrest a defendant while he was in his auto but, due to extenuating circumstances, were forced to deviate from the planned arrest situation. Of the seven assaults occurring in an open area and other locations,[15] only one incident involved the use of a firearm. The remaining six were physical attacks only.

* * *

[15] Other location includes: airport terminal, airport first aid room, airport restroom, carport.

APPENDIX OF CASES

Private Residence

1. An informant was to be utilized in an attempt to gain entry into an apartment and apprehend a defendant without violence. The informant accompanied by two SA's arrived and was admitted into the apartment. After entry, the defendant inquired as to the identities of the SA's. Before the informant could respond, the defendant stood and aimed a pistol at the SA's, ordering them and the informant to place their hands on their heads and remain motionless. Another person then blocked the door and was instructed by defendant to search everyone. This individual stepped toward the SA's and, in so doing, left the door unguarded. Both SA's, while talking in an attempt to pacify the defendant, inched toward door. The defendant observed this movement and cocked the pistol. Both SA's continued talking and managed to open the door and back out of the apartment. The door was then locked from the inside. Surveillance was contacted and instructed to assist. Both SA's knocked again and identified themselves. The defendant refused entry and advised he was going to dial 911. Both SA's encouraged him to do so. The defendant eventually unlocked the door and surveillance entered the apartment. The defendant ran into the kitchen and struggled violently before he was subdued and arrested. One SA sustained neck and knee injuries.

2. Five SA's arrived at a basement apartment to effect the arrest of a defendant. An SA knocked on the door which was opened by another person. The SA identified himself at which time this individual attempted to close the door and began yelling to alert person(s) within. The SA pulled the door open and ran to the rear of the apartment. Another SA attempted to push the subject aside to allow entrance of the other officers. The subject struggled with the SA and grabbed his service revolver, partially cocking the hammer. The other SA's then assisted in subduing and arresting the subject. Defendant was also arrested without further incident. No injuries.

3. Three SA's arrived at a residence to execute the arrest warrant. Two SA's approached the front door while one covered the rear. The defendant came to the front window at which time both SA's identified themselves and stated they wished to talk. After waiting approximately three minutes, the defendant invited one SA, whom he had previously negotiated with, inside. The door was shut on the other SA with defendant advising him to remain outside. Inside the residence, the SA displayed the arrest warrant. Defendant then turned and pushed the SA away. The SA drew his service revolver and advised the defendant to remain motionless. The defendant ran to the hallway and picked up a shotgun. The SA grabbed the barrel of the shotgun and began wrestling with the defendant. Both SA's then entered and assisted in subduing and arresting the defendant. No injuries.

4. As an individual entered the front doorway of the residence, both SA's identified themselves and attempted to question him concerning the location of defendant. The individual then attempted to push both SA's out the doorway. The SA's explained they only wished to question him concerning the whereabouts of defendant. The subject became more abusive and proceeded to shove and punch one of the SA's. The subject was then subdued and placed under arrest. Defendant, who was in the basement at time of the assault incident, was later arrested by surveillance. No injuries.

5. Prior intelligence indicated that a certain residence was being utilized as a storage house for heroin distribution. An SA arrived and knocked on the front door of the residence. (SA was accompanied by seven enforcement officers who concealed themselves from view). The defendant responded but denied knowing the SA, announcing the door would not be opened unless it was the police with a search warrant. The SA then identified himself, stated that he was in possession of a search warrant and requested that the defendant open the door. No reply was received. The SA again announced his presence and purpose. No reply was received, therefore, forced entry was initiated. At this time, the defendant raised the second floor window and fired one shot from a revolver. Two SA's then returned a total of ten shots at the window area. When firing ceased, a

State and Local officer observed movement at the front window area and, in an attempt to gain control of the downstairs area, thrust his gun through the window, discharging one round into the ceiling. At this time, the SA again ordered the defendant to open the door and lay on the floor. The defendant complied and was placed under arrest. No injuries.

6. Six SA's and one A.T.F. Agent, in possession of a Federal warrant, arrived at the defendant's apartment, knocked on the front door and announced their office and purpose. When no response was received, entry was forced. After entering, one SA shouted, "Federal Agents with a search warrant". As the SA proceeded down the hallway, he again announced his office and purpose. Arriving at the bedroom, the SA once again announced his office and proceeded to kick the bedroom door open. At this time he observed the defendant sitting up in a corner of the room with a gun aimed at the bedroom door. The SA then stepped back out of the doorway and ordered the defendant to drop the gun. Looking back into the room, he noticed that the defendant still had the gun pointed at the door. The SA then fired one round from the shotgun before stepping back from the door. The SA again ordered the defendant to drop his gun. Looking back into the room, he noticed that the defendant's hands and head were now concealed by a blanket. Believing that he was still in danger the SA fired one more round from the shotgun. Defendant then surrendered. Defendant sustained fatal gunshot wounds.

7. In possession of a Federal warrant, four SA's and three U.S. Marshalls surrounded the defendant's house, covering all exits. Two SA's and one U.S. Marshall knocked on the front door and identified themselves to the defendant who retreated to the second floor landing after refusing entry. The SA attempted entry but to no avail. Shortly thereafter, the defendant reappeared and fired two successive shots from a pistol. After returning fire, the officers again identified themselves, ordering defendant to surrender. After receiving assurance that no harm would come, the defendant threw his pistol down the stairs and surrendered. One SA received treatment for removal of glass in his left eye.

8. Two SA's and one State and Local officer arrived at the entrance of a trailer home. An SA announced on two separate occasions that he was a Federal Agent with a search warrant. When no reply was received, the State and Local officer kicked the front door open and was immediately confronted by the defendant with drawn automatic pistol. The State and Local officer ordered the defendant to drop his weapon. The defendant refused, further cocking the hammer of his pistol. The State and Local officer, believing that the defendant was about to shoot him, fired twice in succession, both rounds striking the defendant with fatal results.

9. In possession of a state search warrant, one SA and four State and Local officers knocked on an apartment door and announced their authority. Sounds emanated from the rear of the apartment suggesting that drugs were being destroyed. The SA used forced entry and proceeded to the bathroom where he observed the defendant flushing the toilet. The SA identified himself and ordered the defendant away from the toilet. The defendant was then removed to another part of the bathroom. Noticing that the toilet was filled with foil packages, the SA reached in and removed several packages. The defendant then struck him several times in the rib cage, knocking him against the wall. The SA stood up and pushed the defendant into a corner. The attacks occurred twice more. After the third attack, the SA struck the defendant once on the head with his pistol to eliminate the possibility of being hit again. No injuries.

10. In possession of an arrest warrant, two SA's entered an apartment to arrest one defendant (a total of five persons were in apartment during the arrest situation). Five SA's and four State and Local officers remained outside on surveillance. The SA's displayed their identification and arrest warrant to the defendant. At that point, two surveillance SA's gained entrance through the rear of the residence and started toward the basement area. All the occupants, including the defendant, then ran to the basement followed by surveillance officers. In the basement area, the occupants struggled with both SA's and attempted to gain possession of their service revolvers. Calm was eventually restored and the subjects were placed under arrest. No injuries.

Automobile

1. In the process of executing a state search warrant, three Task Force officers (one in full uniform) and two SA's arrived at residence. Shortly afterwards, a vehicle with three defendants inside pulled into driveway. Upon noticing the officers, defendants began to back out. The three Task Force officers approached, identified themselves and ordered vehicle to stop. Vehicle continued backing up at a high rate of speed. Upon reaching the street, vehicle began moving forward. Two of the Task Force officers took position in street directly in front of the vehicle. The vehicle travelled directly toward one officer knocking him to ground. He then fired his weapon in an attempt to halt the vehicle. Vehicle then proceeded forward toward the other officer, knocking him to the ground. He also fired at the vehicle. The third Task Force officer, thinking that both officers had been shot, then opened fire. Two additional officers, one SA and one ATF Agent, who at the time were approaching the residence to be searched, were informed of the fleeing vehicle and gave chase. All defendants were arrested without further incident. Both Task Force officers sustained minor injuries.

2. Subsequent to halting the defendant's vehicle, two SA's exited the OGV and approached both sides of the defendant's auto. SA approaching driver's side held service revolver in his left hand and badge in his right hand, both visible to the defendant, and announced his intent. Defendant then accelerated hard left and forward striking the SA causing his service revolver to accidentally discharge. Both SA's returned to the OGV, and along with two SA's in another OGV, gave chase. SA then observed defendant's vehicle suddenly come to a halt. One OGV was driven in front of and the other to the left of the defendant's auto. All SA's exited and approached the defendant who was then taken into custody. Defendant sustained gunshot wound as a result of the accidental discharge.

3. Prior information indicated that two defendants were involved in the trafficking of large quantities of heroin. Mobile surveillance was maintained on the defendant's vehicle until the order was given to effect their arrest. At this time, two OGV's pulled up to the front and rear of defendants' vehicle. Two SA's exited, identified themselves and advised both defendants they were under arrest. As SA opened passenger door, defendant placed the vehicle in gear. SA ran to front of vehicle, identified himself again and ordered vehicle to stop. Defendant drove toward both SA's who jumped back to avoid being struck. Vehicle proceeded past SA's and down an embankment into a wooded area, crashing into a tree stump. Defendant then ran into woods with SA in pursuit. SA again identified himself and advised defendant to exit the woods. A short time later, defendant returned and was advised that he was under arrest for assault. SA, noticing that defendant was unarmed, placed his service revolver in waistband. As he did so, defendant again attempted to flee but was tackled in the process. A brief struggle ensued, after which the arrest was effected. Other defendant was arrested without incident. No injuries.

4. After execution of search warrant, two SA's remained in the area in an attempt to apprehend defendant upon his arrival home. Defendant accompanied by another individual later drove past the residence. Both SA's followed until defendant exited his vehicle. SA's then identified themselves at which time defendant returned to auto and sped away, striking one SA with the vehicle. SA's returned to OGV and gave chase. After searching the area with negative results, SA's returned to defendant's residence advising subject's mother of his escape. After several phone calls, she contacted and persuaded her son to return home. Subject later arrived and surrendered. No injuries.

5. Information indicated that defendant would be delivering a quantity of heroin via auto. A decision was reached to effect the arrest at a designated intersection. Upon arrival of defendant, OGV's pulled up to the front, rear and right side of defendant's vehicle (all OGV's utilized flashing beacons). SA ran to passenger door, identified himself, ordering defendant to freeze. SA, noticing that defendant had moved his hands toward wheel and gear shift, attempted to open passenger door with negative results. Defendant placed vehicle in reverse and backed into one OGV. Defendant then accelerated toward one SA. At this time, SA, who was attempting passenger door entry, discharged three rounds into the rear of defendant's vehicle. Defendant fled, pursued by five OGV's. Defendant later

lost control of vehicle, which spun out next to a junkyard. Upon arrival, the SA's observed defendant's vehicle stopped with driver's door open. A search was initiated with defendant found hiding under an abandoned auto. He was then placed under arrest. No injuries.

6. after observing one of two defendants placing suitcases in trunk of auto, surveillance SA's approached. Noticing the arrival of both OGV's, defendant entered auto and attempted to depart. Both OGV's blocked exit at which time defendant attempted to go between the OGV's. Failing, he backed up. As surveillance officers approached on foot, defendant accelerated toward one officer. With weapons drawn, surveillance ordered defendant to stop. He complied only after one SA had fallen across hood to avoid being run over. Other defendant was arrested without further incident.

7. After receiving information that defendant was soliciting funds for purchase of marihuana and amphetamines, one SA and one Task Force officer proceeded to parking lot to await defendant's arrival. Upon his arrival, OGV was driven in front of defendant's vehicle and both officers exited. Task Force officer approached driver's side with ID in hand. Defendant accelerated causing Task Force officer to jump back. Both officers pursued. Defendant attempted to ram OGV three or four times during chase. After another near collision, Task Force officer fired one round into right side of vehicle bringing it to a stop. Defendant was then arrested. No injuries.

8. Two teams of SA's assumed surveillance in a field adjacent to a river. SA's were concealed between and under various abandoned vehicles. Intent was to apprehend two defendants, one of whom was a swimmer expected to exit river with six kilograms of cocaine. Defendant, to whom cocaine was to be delivered, entered field and parked at the foot of the river. Shortly after movements were observed in the water, defendant started his car and proceeded toward vehicle occupied by informant and undercover SA. After parking, defendant exited and stood next to informant's vehicle. At this time, two SA's identified themselves in both Spanish and English and shouted for defendant to freeze. Defendant ran to his vehicle, entered the driver's side and was observed to be reaching under the front seat while,

at the same time, accelerating vehicle in the direction of one SA who was approaching from the front. Believing that defendant was reaching for a weapon and about to run over SA, the arresting SA's opened fire. Defendant escaped immediate area but was pursued and arrested by surveillance without further incident. At the time of arrest, a pistol was seized from the purse of defendant's companion. No injuries. It should be noted that due to radio malfunction, contact between surveillance teams and observation post was lost.

Open Area

1. Information was received from a wholesaler indicating that a half shipment of quaaludes would be diverted. After meeting with company officials, SA's substituted a package containing 100 quaaludes from the original 9,600 shipment. Three defendants were initially arrested and agreed to cooperate. Plans were then formulated to effect the arrest of the final two defendants, As arranged, an undercover SA and informant inside CI's vehicle followed the two defendants to a designated location. (Substitute package was located in trunk of CI's vehicle). Both defendants exited their vehicles and proceeded to informant's vehicle. The informant then exited his vehicle as planned. All three individuals engaged in conversation near the rear of CI's vehicle. After a few minutes, trunk of CI's vehicle was lifted (arrest signal) but was quickly lowered as a surveillance vehicle approached. A short time later, trunk was lifted again. Undercover SA and surveillance officers then exited their vehicles. After identifying himself, undercover SA attempted to arrest one defendant, who resisted and tried to escape. SA, while struggling with defendant on the ground, was struck in the face. After defendant was subdued, a search revealed a loaded gun. Other defendant was arrested without a struggle. No injuries.

2. Three SA's observed two defendants standing on street corner. Defendants were to be arrested in connection with cocaine delivery. The SA's approached and announced their office. One defendant was then placed under arrest. At that time, the other defendant made a remark about law enforcement officials. SA then turned toward this individual and was physically struck by him. Subject was then subdued with necessary force and placed under arrest. No injuries.

3. In possession of an arrest warrant, two SA's observed the defendant enter a vehicle on the passenger side. The OGV was then driven in front of defendant's vehicle. Both SA's exited, identified themselves and ordered defendant to step out and place his hands on the roof of the vehicle. After ignoring at least three repeated demands, the defendant finally exited and, with gun in hand, moved in a crouched position to the rear of the vehicle. Both SA's approached and, as one SA neared the rear of the vehicle, the defendant aimed his gun at him. (Subsequent investigation indicated that defendant's weapon misfired due to faulty ammunition). The SA responded by firing three shots at defendant. Stepping to the rear of the vehicle, the SA observed the defendant crouching with the pistol in hand facing the other SA. The SA then fired a fourth shot, wounding the defendant. The defendant began struggling at which time the SA struck him on the head with his pistol which discharged. Both SA's then subdued the defendant.

Airport Terminal

1. During inspection of arriving flights, two SA's approached a defendant, identified themselves and requested defendant's identification. SA's then asked defendant to accompany them to another location for further questioning. At this time, defendant struck both SA's in chest with forearm and clenched fist. Pursued by four SA's, defendant exited passenger tunnel and entered parking lot. During chase, SA's observed defendant place his hand in jacket pocket. Thinking that defendant was attempting to draw a weapon, two SA's withdrew their service revolvers and commanded him to stop. Defendant turned and yelled "don't shoot". He then removed the heroin from his pocket and tossed it over the Fence. Defendant was arrested without further incident. No injuries.

Airport First Aid Room

1. Two SA's, on routine inspection of arriving flights, identified themselves to defendant and asked him to accompany them to first aid room. After entering, defendant attempted to flush the heroin down the sink. A brief struggle ensued. Defendant was then subdued and placed under arrest. No injuries.

Airport Restroom

1. SA, on inspection of arriving flights, followed defendant to airport terminal entrance. SA identified himself and asked defendant to accompany him to airport restroom. After entering, defendant ran to restroom stall and attempted to flush heroin packet down the toilet. SA followed and removed packet. After struggling, SA then forcibly removed defendant from restroom. No injuries.

Carport

1. In possession of a search warrant, two teams of Task Force officers approached the front and rear of a private residence. Other officers remained in the immediate vicinity. After observing four defendants inside a pickup truck parked in the carport of the residence, two Task Force officers approached, identified themselves and ordered the defendants to exit the vehicle. After exiting, one defendant physically struck one of the officers on the jaw. The officer retaliated by striking the defendant in the mouth. During the incident, another defendant attempted to assault the officer but was restrained by a third Task Force officer who had entered the carport. Two additional Task Force officers then approached the carport and, after seeing that the situation was under control, proceeded to secure the residence. Returning to the carport, one of the officers approached the defendant, who had assaulted the arresting officer, identified himself and stated that he was in possession of a search warrant. The defendant then struck the officer with his fist. A struggle ensued between the defendants and the arresting officers. All defendants were eventually handcuffed and arrested. One Task Force officer was hospitalized and treated for a fractured nose, eye and lip bruises.

BRIEF
APPENDIX B

BRIEF APPENDIX B

DRUG AGENTS GUIDE

TO

SEARCH & SEIZURE

Written by

Harry L. Myers, Esquire
Office of Chief Counsel
Drug Enforcement Administration
U.S. Department of Justice

1978

WARNING

The rules contained in this Guide are based upon the Fourth Amendment to the United States Constitution, as interpreted by the Supreme Court and by a majority of lower federal courts. A few of the rules have been interpreted or applied differently by a number of lower courts, both state and federal. Moreover, many states impose tougher restrictions on police conduct than the federal Constitution does. It is imperative, therefore, that you

CONSULT YOUR PROSECUTOR OR LEGAL ADVISOR BEFORE APPLYING THE RULES CONTAINED IN THIS GUIDE! [(ii)]

DRUG AGENTS GUIDE TO SEARCH & SEIZURE

by Harry L. Myers
Office of Chief Counsel
Drug Enforcement Administration

I. Introduction

It is extremely difficult today to obtain a good working knowledge of search and seizure law. First, the sheer number of cases being decided on the subject makes it impractical to stay current with every small change or interpretation handed down by the courts. The volume of cases decided, almost on a daily basis, is overwhelming. Second, many of the reported decisions conflict with one another. Trying to extract rules from these decisions, which can be confidently applied in future investigations, is always frustrating and frequently impossible. Third, there are countless factual situations involving Fourth Amendment protections which have never been resolved by the courts. How can an agent be expected to cope with so many unknowns? Finally, assuming the conflicting decisions could be resolved and a rule could be found for every case, how could a law enforcement officer learn such a large body of law?

In spite of these hurdles, drug enforcement officers must develop a practical knowledge of search and seizure law. Without it, they run the risk of violating constitutional rights, they jeopardize the successful prosecution of their cases, and they expose themselves to civil lawsuits for damages.

The solution to this dilemma—the absolute need to learn the law, on the one hand, and the many hurdles to learning, on the other—lies in a two step approach: [-6-]

(i) LEARNING THE CLEAR-CUT RULES, and

(ii) DEVELOPING A LOGICAL SYSTEM TO APPLY THE RULES TO ANY PROBLEM. [-7-]

A knowledge of the basic rules is essential. These core principles are applicable to every case, they remain unchanged for long periods of time, and they are recognized and accepted by virtually every court. Learning these clear-cut rules is the first step to learning the law.

Developing a thorough, systematic approach for applying these rules to most factual situations is equally essential. Analyzing a problem, identifying the legal questions, and selecting the correct legal rules, should not be a "hit or miss" proposition. A logical approach is needed: one that insures a more thorough analysis, prevents jumping to "gut" conclusions, and makes complex situations easier to solve by breaking them down into smaller, simpler, problems. Cromberg, et al., *On Solving Legal Problems,* 27 Journal of Legal Education 165 (1975).

These two steps offer the best way to develop a working knowledge of search and seizure law in the least amount of time. An officer cannot memorize the rule of law for every possible case he will encounter. Learning the basic rules and knowing how to apply them offers a way to cope with the endless variations that must be faced. [-7-]

* * *

4. Search Can't Exceed Warrant's Scope

A search warrant restricts the search to only those places, and for only those objects, described in the warrant. The search cannot exceed this scope.

a. *Areas to be Searched* [-78-]

* * *

3) *Persons on Premises*

A search warrant for premises does not automatically authorize a *full* search of persons either found on the premises or who come onto the premises while the search is in progress (*U.S.* v. *Di Re.* 68 S.Ct. 222, 1948; *U.S.* v. *Festa,* 192 F. Supp.

160, DC Mass. 1960; *Smith* v. *State,* 289 So 2d 816, Ala. 1974; *State* v. *Bradbury,* 243 A.2d 302, N.H. 1968; *State* v. *Carufel,* 263 A.2d 686, R.I. 1970; *State* v. *Fox,* 168 N.W. 2d 260, Minn. 1969; *State* v. *Massie,* 120 S.E. 514, W.Va. 1923; *People* v. *Smith,* 234 N.E. 2d 460, N.Y. 1967; *Purkay* v. *Maby,* 193 P. 79, Idaho, 1920).

If, on the other hand, the persons on the premises or coming onto the premises are connected to the illegal activity, and could be concealing objects named in the warrant, they can be searched for those objects (See *U.S.* v. *Peep,* 490 F.2d 903, 8 Cir. 1974; *U.S.* v. *Micheli,* 487 F.2d 429, 1 Cir. 1973; *U.S.* v. *Johnson,* 475 F.2d 977, DC Cir. 1973).

It is not clear whether you need probable cause or simply a reasonable suspicion to believe persons on premises are concealing items named in the warrant, but you must be able to articulate some facts which make it likely.

Example. You have probable cause to believe Charlie is distributing drugs to a steady stream of buyers visiting his house trailer. You get a valid warrant to search the trailer and Charlie for drugs. While executing the warrant you find marihuana, scales, plastic baggies, rolled marihuana cigarettes, methamphetamines and other drug paraphernalia. [-79-]

The phone rings. You answer it. A man asks for Charlie. You say "He's busy, but come on over." Within a few minutes a man knocks and you let him in. He is carrying a brown paper bag. Does the warrant permit you to conduct a full search of this visitor?

Yes. Although a search warrant for premises does not automatically extend to persons on the premises, you have sufficient facts and circumstances to believe the visitor is there either to buy from or to supply Charlie with drugs, and that he may be concealing items named in the warrant. Therefore, he can be searched (See *Earnest* v. *State,* 314 So. 2d 796, Fla App. 1975).

Example. You have probable cause to believe that Milt is involved in drug trafficking and that he stores large quantities of heroin at his barber shop. You have no indication that Milt is selling to shop customers. You obtain a warrant to search Milt and his shop. You execute the warrant at noon on a business day. While you are searching, a clean-cut male, dressed in a three-piece suit comes to the shop and you let him in. One of the barbers tells him the shop is closed and to come back tomorrow. You know nothing about the man. May you subject him to a full search under the warrant? [-80-]

No. There is no evidence that the shop is retailing drugs to a steady stream of customers. You have no information to link the visitor to criminal activity. The man is likely to be an innocent customer who knows nothing of Milt's activities. Therefore, the warrant to search the shop does not extend to him (See *Smith* v. *State,* 227 S.E. 2d 911 Ga. App. 1976; *Smith* v. *State,* 289 S.2d 816, Ala. 1974; *U.S.* v. *Branch,* 545 F.2d 177, DC Cir. 1976). [-81-]

* * *

5. Protective Measures

A search warrant is an order issued by a judicial officer in the name of the government, commanding an officer to conduct a search for specified objects.

Persons do not have the right to forcibly resist the execution of a search warrant, even though the warrant may later be held to be invalid (*U.S.* v. *Ferrone,* 438 F.2d 381, 3 Cir. cert. den., 91 S.Ct. 2188, 1971).

a. **Anything Necessary and Proper.** Subject to department restrictions (for example, restrictions on the offensive use of firearms) and to restrictions imposed by statute, you may do whatever is necessary and proper under the circumstances to execute the warrant (*Clifton* v. *Cox,* 549 F.2d 722, 9 Cir. 1977).

b. **Securing Persons.** You can restrict the movement of persons on the premises both to protect yourself and to prevent interference (*U.S.* v. *McKethan,* 247 F. Supp. 324, D.DC. 1965) [-83-]

You *may* be justified in frisking persons found on the premises for your protection while executing the search. See the "Stop & Frisk" section of this outline for a discussion of the right to frisk.

Remember: Your right to secure the persons found on the premises does not automatically include the right to conduct a *full* search of their person.

c. **Securing Weapons.** You have the right to locate and take temporary possession of any weapons in the area which you reasonably believe could be used against you (*U.S.* v. *Chapman,* 549 F.2d 1075, 6 Cir. 1977; *U.S.* v. *Bowdach,* 414 F. Supp. 1346, SD Fla. 1976; *U.S.* v. *Gilbert,* 378 F.Supp. 82, WD So. Dak. 1974; *U.S.* v. *James,* 408 F. Supp. 527, SD Miss. 1973).

Of course, once the search is over and the danger has passed, continued possession of the weapon cannot be justified as a safety measure. Unless some other justification exists for retaining the weapon it must be returned to the owner (See the "Plain View" section of this outline). [-84-]

* * *

BRIEF
APPENDIX C

BRIEF APPENDIX C

THE PEOPLE OF THE STATE OF ILLINOIS, ***Plaintiff-Appellee,*** **vs.** **GLORIA MILLER,** ***Defendant-Appellant.***	Appeal From The Circuit Court of Cook County. — Honorable **WARREN D. WOLFSON,** Judge Presiding.

Mr. JUSTICE O'CONNOR delivered the opinion of the court:

Defendant, Gloria Miller, was indicted on two counts of possession of a controlled substance. After a bench trial, defendant was found guilty as charged. The circuit court of Cook County sentenced her to concurrent terms of imprisonment of 4 to 6 years on count one and 1 to 3 years, plus a $1,000 fine, on count two. Defendant appeals the judgments of conviction, contending only that the trial court erred in denying her motion to quash her arrest and suppress physical evidence.

Officer Cleophus Johnson was called as a witness on the motion to suppress. Johnson testified that on April 25, 1975, at about 12:45 a.m., his partner, Officer Nathan Gibson, eight to ten other officers and himself had occasion to execute a search warrant. The warrant stated that there was probable cause to believe that a quantity of heroin was located upon the person of Carolyn Harris and in her third floor apartment in Chicago. The officers were in plain clothes and forced their way through the front door by using crowbars and sledge hammers. They searched the apartment for about one to one and one-half hours, discovering a quantity of narcotics and three handguns. As a result, James and Carolyn Harris were arrested for possession of narcotics.

According to Johnson, about an hour and one-half after the officers' entry, while they were concluding their search in the living room, he heard a knock at the rear door. When he first saw the defendant, she and a male companion (Earl Charles) had entered through the back door and were walking to the living room. Johnson testified that he did not draw his gun and did not see Gibson's weapon drawn. Nor did the officers order defendant or her companion to enter the apartment.

Johnson further testified that the officers asked Charles who he was, why he was there and whether he lived there. His response, if any, is not of record. Approximately two to three minutes after defendant and Charles entered the apartment, the officers searched Charles and recovered a weapon. Johnson testified that at the time of this search defendant was not free to leave. A few minutes later Johnson noticed a large bulge in defendant's pants. Upon questioning, defendant replied that it was a sanitary napkin. Officer Johnson told her, "it wouldn't stick out like that" and said she would have to be handcuffed until she was searched by a police matron. According to Johnson, Charles whispered to defendant that she "might as well give it to him." At this point defendant proceeded to the bathroom accompanied by the officers. She unzipped her pants and removed two clear plastic bags containing a brown narcotic powder. Defendant was arrested and transported to the police station, where she produced more narcotics from her bra.

On cross-examination, Johnson testified that the rear door of the apartment leads to an enclosed porch. The majority of the officers involved in the search had already left the premises when defendant arrived. He indicated that the bulge in defendant's pants was pointed and could have been another weapon. When defendant was walking to the bathroom, Johnson remained close behind her.

On redirect-examination, Johnson explained that when defendant and Charles knocked on the door, the officers had already searched every room in the apartment, but were making a final search of the living room. Officer Johnson also testified concerning his safety:

"Q You said when you saw the bulge you believed in your mind that it was a weapon, is that correct?

"A Yes.

"Q You didn't have a weapon drawn?

"A No.

"Q Therefore, Officer, were you in fear for your safety at this point?

"A Not at this point.

* * *

"Q At anytime that evening before she gave you some objects from her pants were you in fear of your safety because you thought she had a weapon in her pants?

"A No.

* * *

"Q When did you feel that your safety was in danger?

"A If I turned my back she would have a chance to go in her pants, but as long as I was facing her, I didn't feel—

* * *

"Q Did you ever turn your back on Gloria Miller?

"A No."

Defendant was not handcuffed until she was arrested. On recross-examination, Johnson explained that if defendant made a move, he could keep physical control.

Johnson's partner, Officer Nathan Gibson, also testified at the suppression hearing. Gibson stated that at about 2 a.m., he and Johnson first encountered defendant and Charles in the kitchen. He observed that the door between the kitchen and the enclosed porch was open. There was a wooden door from the porch to the outside which had a lock.

Gibson was the first officer to confront defendant and he had his weapon drawn. He testified that Johnson was behind him and did not have his weapon drawn. Gibson informed the couple that a "flash raid" was being conducted. Charles said he had come to see Carolyn Harris. According to Gibson, he did not point his weapon at the couple and neither officer directed them to enter the apartment. The officers frisked Charles and recovered the handgun. Gibson subsequently noticed a large bulge shaped like a half moon in the crotch of defendant's pants. When Gibson questioned defendant about the bulge, she said it was contraband. Charles told her to give the contraband to the officers. She surrendered the contraband, was arrested and advised of her rights. At the station she informed the police she had more contraband in her bra.

Defendant did not make any movements or gestures to indicate to the officer that he had reason to fear for his safety. Nonetheless, Gibson was cautious because of the handguns previously recovered and because defendant had not been searched. He did not turn his back on defendant. Gibson also stated that from the moment defendant entered the apartment she was not free to leave.

Officer Gibson further testified as to his frame of mind upon encountering defendant and Charles:

> "* * * [W]e were conducting this raid, and when I met Gloria Miller and Earl Charles in the kitchen in the area, I did not know why they were there. And when they informed me they wanted to see Carolyn Harris, whom we had a search warrant for, and her premises, I felt that it was necessary to conduct a protective search of the male."

Gibson stated that it was his intention to conduct an investigatory "field interview" of the couple upon their entry.

James Harris testified for the defendant that on April 25, 1975, he lived with his wife and two small children in the third floor apartment named in the warrant. He had gone to bed at about 4 p.m. and was awakened between 9 and 10 p.m. by policemen breaking down the front door. The police conducted a search of the apartment and ultimately arrested James and Carolyn Harris.

According to Harris, between 3 and 3:30 a.m. he was sitting handcuffed in the living room with his wife, two children, and Officers Kelly, Johnson and Gibson. They were waiting for Carolyn Harris' mother to arrive to pick up the children before being transported to jail. All the other officers had left the premises; the search had been completed 30 to 45 minutes previously and the officers were listening to his stereo.

At this time and under these circumstances, there was a knock at the back door of the apartment. Harris testified that this door led outside of the apartment and was padlocked and secured from the inside by an iron bar, commonly called a police lock. Inside this door was an enclosed porch. French doors separated the porch from the kitchen. Harris further testified that Officers Johnson and Gibson went to answer the door. It took them two to three minutes to operate the police lock and open the door. Both officers were in the enclosed porch area. Gibson opened the door, directed defendant and Charles inside with a waving motion of his left hand, and with his right hand pointed his service revolver out the door.

The trial court considered all of the above evidence and made certain findings of fact. Initially, the court found that:

> "* * * [T]o place the testimony of Officer Gibson alongside the testimony of Officer Johnson, the only reasonable conclusion would be that they are not credible

witnesses, that the contradictions in their testimony, I think, are unexplainable. I won't go down the entire list of them."

The court found Harris' testimony credible and accepted it for the purpose of its opinion.

After resolving credibility, the trial court stated additional findings which follow in pertinent part:

"There was a knock on the door in the early morning hours of April 25th of 1975. The police were on the premises, had conducted a search pursuant to a lawful warrant, * * *.

"I find the police invited, and I use the term invited in much the same way the Court use [sic] directed in Pugh, invited Gloria Miller and Earl Charles, her companion, into the premises; one officer having his gun drawn at least. And I find further that it was not a voluntary entry onto the premises.

"I further find that the police were on the premises for a proper purpose, that they had at that point already found contraband during a lawful search and were in the process of * * * taking the Harrises into custody.

"I find that while the search itself had been completed, the police were still in the place where they had a right to be and that they were waiting for somebody in the family to arrive to care for the children of Mr. and Mrs. Harris.

"I further find that three handguns had been found in the apartment before Gloria Miller entered the premises."

Under these facts, the trial court ruled that Ill. Rev. Stat. 1975, ch. 38, par. 108-9, and *People* v. *Pugh* (1966), 69 Ill. App. 2d 312, 217 N.E.2d 557, enabled the officers to legally require defendant and Charles to enter the premises. Moreover, the court believed the officers had a right to frisk them for weapons.

The sole issue on appeal is whether, pursuant to Ill. Rev. Stat. 1975, ch. 38, par. 108-9 and decisional law, the police may order a citizen not on the premises nor named in the search warrant to enter and subject themselves to a search.

For purposes of this opinion we accept, in substance, the trial court's findings of fact. However, we find the officers had no legal right to force defendant onto the premises and search her. Accordingly, we reverse and remand.

Preliminary to determining whether the search was valid, the State does not contend that defendant acted voluntarily in turning over the contraband stored in her pants. Thus, they have conceded that presenting defendant with the choice of cooperation or handcuffing and subsequent search by a police matron constituted a search under the fourth amendment. (U.S. Const., amend. IV.)

Ill. Rev. Stat. 1975, ch. 38, par. 108-9 provides:

"In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

(a) To protect himself from attack, or

(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

The thrust of the statute is that by virtue of the authority to search the premises, it is sometimes permissible to search persons on those premises. The statute does not expressly state that the officer must have probable cause to believe one on the premises possesses a weapon or the items described in the warrant. However, the language "reasonably detain to search" suggests that the officer must be prepared to show some reason to suspect that the person on the premises might attack him or attempt to dispose of or conceal items named in the search warrant. (*People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363

N.E.2d 62.) An additional requirement, not apparent from the face of the statute but implied by decisional law, is some showing that the person searched have some connection with the premises. *People* v. *Campbell* (1979), 67 Ill. App. 3d 748, 753, 385 N.E.2d 171; *People* v. *Dukes.*

In applying this statute to the case at bar, we must also consider the relative timing of the apartment search and defendant's non-voluntary entry. The Committee Comments to section 108-9 recognize that the need for a search usually arises "* * * when the officer first arrives at the place where the goods are to be seized." Further language is also instructive:

> "* * * The need for this power arises most often in the narcotics cases where disposition is most easily effected.
>
> * * *
>
> "* * * Furthermore, if a judge decides there is probable cause for issuing the warrant in the first place, then this power given to the officer which is parasitic to the warrant should not be considered excessive in the hands of the executing officer." Ill. Ann. Stat., ch. 38, par. 108-9, Council Commentary, at 271 (Smith-Hurd, 1973).

However, to ensure that the power given the executing officer is not excessive, the timing of a search pursuant to the statute must be strictly construed. (*People* v. *One 1968 Cadillac Automobile* (1972), 4 Ill. App. 3d 780, 281 N.E.2d 776.)

> "* * * The statute does not grant to police the power to search someone at their leisure. The need for the search is immediate, and it must be conducted at the earliest opportune moment after the danger presents itself. * * *"
>
> 4 Ill. App. 3d, at 787, 281 N.E.2d, at 781.

Moreover, the language "may reasonably detain to search" must be strictly construed in light of the teaching of the United States Supreme Court in *Delaware* v. *Prouse* (March 27, 1979), 47 U.S.L.W. 4323, and *Terry* v. *Ohio* (1968), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. *Terry* and *Prouse* indicate that a

detention is a "seizure" within the meaning of the fourth amendment even when the purpose of the stop is limited and the resulting detention is quite brief. Accordingly, when defendant and Charles were "invited" into the apartment at gunpoint and made a non-voluntary entry, their detention constituted a seizure within the meaning of the fourth amendment. Officers Johnson and Gibson both testified that defendant was not free to leave.

Classifying defendant's detention as a "seizure" does not end our inquiry, however. The fourth amendment only prohibits unreasonable searches and seizures. The reasonableness, and hence the permissibility, of a particular law enforcement practice is judged by balancing the intrusion on an individual's fourth amendment interests versus promotion of a legitimate government interest. (*Delaware* v. *Prouse* (March 27, 1979), 47 U.S.L.W. 4323.) In accordance with the teaching of *Terry* and *Prouse,* we construe the language "reasonably detain to search" to require that the executing officer can express at least an articulable and reasonable suspicion that either a search or a detention (or both) is for an enumerated purpose of section 108-9. By this requirement the courts will be provided with a record containing specific articulable facts which, together with rational inferences from those facts, will indicate whether either of the twin functions of section 108-9 is met and, accordingly, whether either the search or the seizure (or both) is reasonable. *Delaware* v. *Prouse; Terry* v. *Ohio.*

Applying these principles to the facts of the instant case, we conclude that the seizure and search of defendant were unreasonable and did not comport with the requirements of section 108-9. Initially, strict compliance with the statute only enables detention and search of any person on the premises at the time the warrant is executed. The trial court found that the search had been completed. This finding is supported by Harris' testimony that the search ended 30 to 45 minutes prior to defendant's arrival. Nonetheless, the trial court believed that

since the police were still on the premises for the lawful purpose of taking the Harrises into custody, the statute was satisfied. Such an expansive reading of section 108-9, however, contravenes its purpose as indicated by the Committee Comments: The need for a search arises " * * * when the officer first arrives at the place where the goods are to be seized." Ill. Ann. Stat., ch. 38, par. 108-9, Council Commentary, at 271 (Smith-Hurd, 1973).

The trial court's belief that *People* v. *Pugh* (1966), 69 Ill. App. 2d 312, 217 N.E.2d 557, was dispositive was erroneous since that case is distinguishable. In *Pugh,* defendant was admitted at the direction of the officers while the search of the premises was in progress. His detention and search occurred about fifteen minutes after the officers entered the apartment and before the officers had discovered any contraband in the apartment. The *Pugh* court further indicated that:

> " * * * We agree with the State that the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all the persons present on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the defendant onto premises where the police have reason to believe narcotics are concealed provides further grounds for his search. * * * "
>
> 69 Ill. App. 2d, at 316; 217 N.E.2d, at 559.

The circumstances in the instant case differ since the premises had been thoroughly searched, handguns and narcotics had already been recovered, and the residents had been arrested. The officers' reliance on section 108-9 was not well founded because its purpose had been attained by their successful execution of the warrant and the ensuing arrests. *Pugh* is also distinguishable because there is some indication that Raymond Pugh was the brother of Jessie Pugh, the resident named in the warrant. See *People* v. *Campbell* (1979), 67 Ill.

App. 3d 748, 750, 385 N.E.2d 171. Defendant's connection with the premises described in the warrant is not apparent.

The State contends that the requisite connection was established through Harris' testimony that he had known the defendant and Charles for one to one and one-half years. They had previously visited his apartment and on at least one occasion had been there at 3 to 4 a.m. Clearly, defendant and Charles had a greater connection with the premises than the defendant in *People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363 N.E.2d 62. Dukes was an innocent stranger who had mistakenly entered premises being searched. Defendant and Charles were guests and acquaintances of the Harrises. However, the *Dukes* court indicated that connection with the premises may mean more than a social guest:

> " * * * [T]he record articulates no facts indicating that the defendant had any connection with the premises described in the warrant. The defendant was not on the premises when the police officers arrived to execute the warrant, nor does it appear that the defendant lived on the premises or was related to anyone who lived there."
> 48 Ill. App. 3d, at 240, 363 N.E.2d, at 64.

See also W. LaFave, *Search and Seizure: Course of True Law,* 1966 U. of Ill. Law Forum 255, at pp. 271-273 (concerning the requirement of connection with the premises). Compare *People* v. *Campbell* (1979), 67 Ill. App. 3d 748, 385 N.E.2d 171 (defendant, who was a resident of the premises and entered without knocking while police were conducting a search, deemed to have sufficient connection with the premises).

Moreover, the record fails to indicate that the officers knew defendant had sufficient connection with the premises. Johnson testified that Charles was asked who he was, why he was there and whether he lived there. His response, if any, and any questioning of defendant are not of record. Gibson testified

that Charles told him he had come to see Carolyn Harris. Even if we accept the officer's testimony in a light most favorable to the State, defendant was merely a visitor arriving after a completed search. Accordingly, under these circumstances, we find that defendant lacked sufficient connection with the premises to justify her seizure and search.

We turn next to the twin purposes of section 108-9 to review whether the officers complied with the "reasonably detain to search" language of the statute. In other words, we review the record to see if the officers manifested specific articulable facts which, together with rational inferences from those facts, indicated the necessity to protect themselves from attack or to prevent disposal or concealment of contraband described in the warrant.

The State contends that the police reasonably believed that defendant might attack them. They had discovered three handguns in the apartment prior to the arrival of defendant and Charles and had found a weapon on Charles. However, at the point when defendant and Charles were "directed" to enter the apartment, Officer Gibson had his service revolver drawn and pointed. Johnson's testimony, reported above in pertinent part, clearly indicates that he was never in fear for his safety. He explained that he believed he could maintain physical control over defendant so long as he did not turn his back on her. Gibson testified he was apprehensive and cautious because handguns had previously been recovered. Yet, since he had his service revolver drawn, it is apparent that he, too, was in control. Both officers indicated they did not turn their backs on defendant and kept close proximity to her. Defendant made no furtive movements to indicate to the officers that they might be in danger.

Furthermore, in light of the trial court's opinion that Johnson and Gibson were not credible witnesses, we doubt the validity of their testimony that defendant may have had a gun

stored in the crotch of her pants. Johnson indicated that the bulge was pointed and might have been a weapon. Gibson testified the bulge was half-moon shaped and large. In short, we agree with defendant that the officers' testimony concerning the bulge in her crotch area is hardly consistent with the possibility of a concealed weapon. Accordingly, we find the record does not support a finding that the officers reasonably suspected an attack.

Finally, we also conclude that there is no showing that the police reasonably suspected defendant would destroy or conceal items described in the warrant. The State concedes that the record is silent as to whether either officer believed that defendant possessed any narcotics named in the warrant or might attempt to conceal or dispose of such items. Nonetheless, the State contends there is circumstantial justification for a reasonable belief that defendant was engaged in narcotics activities. Narcotics had been recovered from Carolyn Harris. Defendant and Charles knew the Harrises and had previously visited them. This visit occurred at about 3 a.m. and the police observed a bulge in defendant's pants.

We do not agree. Defendant was not even on the premises when the officers entered and began their search. When she did enter, the premises had been thoroughly searched, evidence gathered and the perpetrators handcuffed. The Committee Comments indicate that the need to search individuals not listed in the search warrant for items described in the warrant arises when the officers first arrive and execute the warrant. Accordingly, since the warrant had been successfully executed, there was no showing defendant would destroy or conceal items described in the warrant.

For the foregoing reasons, we find the detention to search defendant was unreasonable and we reverse the order of the circuit court of Cook County denying defendant's motion to

quash arrest and suppress physical evidence. Because defendant's arrest is quashed and because the sole evidence against defendant is evidence found as a result of the search, the judgment of conviction must be reversed. *People* v. *Bowen* (1963), 29 Ill. 2d 349, 194 N.E.2d 316, *cert. denied* (1964), 376 U.S. 927.

Reversed.

McGLOON and CAMPBELL, JJ., concur.

FOR ARGUMENT

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA, *Appellant,*

v.

PEOPLE OF THE STATE OF ILLINOIS, *Appellee.*

On Appeal From the Appellate Court of Illinois, Second District

REPLY BRIEF FOR THE APPELLANT

RALPH RUEBNER
Deputy Defender

ALAN D. GOLDBERG
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
130 North Wells, Suite 2200
Chicago, Illinois 60606
(312) 793-5472
Councel for Appellant

Of Counsel

MARY ROBINSON,
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

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IN THE

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OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA, *Appellant,*

v.

PEOPLE OF THE STATE OF ILLINOIS, *Appellee.*

On Appeal From the Appellate Court of Illinois, Second District

REPLY BRIEF FOR THE APPELLANT

INTRODUCTION

Appellant takes issue with the manner in which the facts of this case are treated in appellee's brief. The appellee would have this Court believe that the complaint for search warrant established that patrons of the tavern were narcotics purchasers (Brief of appellee, p. 3) and that the sale of heroin at the tavern was "open and notorious". (Brief of appellee, pp. 6-7, 22). Both of these assertions are untrue. The complaint for search warrant (A. 3) does not even mention the patrons, and neither the complaint nor the testimony presented at the suppression hearing indicates that the patrons would have been aware that nar-

cotics were being sold in the bar. These facts will be discussed more fully in the body of this brief. (See pages 7-12, 15-16, *infra*).

ARGUMENT

I

Since the Initial Frisk of All of the Patrons of the Aurora Tap by a Police Officer Was Not Based Upon a Reasonable Belief That the Patrons Were Armed or Dangerous, the Initial Pat-Down and Subsequent Search of One of the Patrons, Ventura Ybarra, Was Illegal.

As the appellee itself concedes, it has advanced a new theory to justify the search of Ventura Ybarra. (Brief of appellee, p. 8) The trial and Appellate courts held the search justified under *Ill. Rev. Stat.*, 1975, Ch. 38, Sec. 108-9(b), which allows police officers executing a warrant to search all persons present to prevent the disposal or concealment of the items named in the warrant. The appellee now contends that the search of Ybarra was proper without regard to the statute, because it was performed with probable cause. This contention is made despite the fact that at the hearing on the motion to suppress in the Circuit Court of Kane County, Illinois, the prosecutor conceded that probable cause to search Ybarra did not exist. (A. 39)

Specifically, the appellee argues that the first pat-down search of Ybarra was a reasonable search for weapons, and that this pat-down yielded probable cause to believe that Ybarra possessed contraband. Both of these contentions are incorrect. The facts of this case demonstrate that the initial pat-down was impermissible, and, in any event,

the pat-down did not yield probable cause to justify a full search. Part A of this argument will deal with the question of the validity of the initial pat-down. Part B of the argument will deal with the validity of the second search.

A. The Rule Proposed by the Appellee—That a Pat-Down for Weapons of All Persons Found at a Public Establishment Where Police Officers Are Executing a Search Warrant Is *per se* Reasonable, So Long As the Officers "Do Not Have Reason to Believe That the Persons On the Scene Have No Relationship Whatever to the Premises or the Drugs Being Sought"—Would Result in the Search of Countless Citizens Whom the Police Had No Reason to Fear.

The appellee's first argument is that the initial frisk of Ventura Ybarra and all of the other patrons of the Aurora Tap was permissible as a reasonable weapons frisk. However, in order to reach this conclusion, the appellee finds it necessary to propose a *per se* rule, which it phrases in various ways. In the "Questions Presented" portion of its brief the appellee puts the question this way:

> Is it reasonable, under the Fourth Amendment and this Court's decisions in the *Terry v. Ohio* line of cases, for officers executing a search warrant seeking heroin allegedly being offered for sale in a small tavern[1] to frisk all patrons present at the time? (Brief of appellee, p. 1)

The appellee's answer to this question is yes. In the heading to Argument IA of its brief, the appellee asserts:

> It is *always* reasonable for officers to frisk all fully clothed adults on the premises, where the officers are

---

[1]The tavern was actually described as a *large* one-room tavern. (A. 59)

> executing a search warrant for heroin and the complaint has informed them that some or all of these persons are users and/or dealers in heroin.[2] (Brief of appellee, p. 9) (Emphasis added)

In the body of Argument IA, the appellee requests:

> . . . that this Court allow a limited pat-down search for weapons of all fully clothed persons old enough to carry them on the premises where a search warrant is being executed for heroin or similar hard, mind-altering narcotic drugs, where the officers do not have reason to believe that the persons on the scene have no relationship whatever to the premises or to the drugs being sought. (Brief of appellee, p. 17)

No matter how the appellee's request is phrased, its contention that the pat-down of the patrons was permissible cannot be based on *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In *Terry*, the Court held that where a police officer possesses a reasonable belief, based on specific and articulable facts, that a person is armed and dangerous, a frisk for weapons is permissible. *Terry*, 392 U.S. at 27. By contrast, the appellee asks this Court to fashion a rule that would permit police officers executing a search warrant to search *all* persons present for weapons even though the officers did not have any suspicions regarding those persons. Moreover, the statement of the appellee's proposed rule at page 17 of its brief includes the assertion that a search of all persons on premises where a search warrant is being executed should occur

[2]The complaint in fact did not so state. See pages 7-8 of this brief for a fuller discussion of the contents of the complaint for search warrant.

"where the officers do not have reason to believe that the persons on the scene have no relationship whatever to the premises or to the drugs being sought." This unique rule would apparently place the burden on the person about to be searched to show that he had no relationship to the premises or the contraband in order to avoid being searched, instead of placing the burden on the police to articulate the reasons for intrusion. Under this rule, if the police knew nothing about a person present where a warrant was being executed, they could search him.

The appellee's proposed rule would run directly contrary to the general rule that an intrusion on Fourth Amendment rights must be based on reasonable and articulable suspicion at the least. *Delaware v. Prouse*, _____ U.S. _____, 99 S. Ct. 1391, 59 L.Ed. 2d 662, 669 (1979); *Brown v. Texas*, _____ U.S. _____, _____ S. Ct. _____, 61 L.Ed. 2d 357 (1979). Appellee's position would also be contrary to the rule that a person's mere presence at the scene of suspected criminal activity cannot justify a search of that person. *Sibron v. New York*, 392 U.S. 40, 62, 88 S. Ct. 1889, 20 L. Ed. 2d 917, 934 (1968). (See original brief of appellant, p. 14). Finally, it would conflict with the proscription against "general warrants" contained in the Fourth Amendment. *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). (See original brief of appellant, p. 15). Moreover, such a rule would permit the search of countless citizens whom the police had no reason to fear. Any citizen enjoying a meal at a restaurant, shopping at a store, or sitting in a bar would be subject to search simply because someone on these premises was engaged in criminal activity.

Apparently, the appellee finds it necessary to adopt such an extreme position because the facts of this case demonstrate that the officer who frisked Ybarra and all of the other patrons had neither probable cause nor articulable suspicion regarding Ybarra or any other patron. An examination of the facts will demonstrate this.

First of all, contrary to the appellee's contention, the complaint for search warrant did not indicate explicitly or implicitly that the patrons of the Aurora Tap were narcotics purchasers or users. The pertinent portion of the complaint states as follows:

> 3. The informant related to me that over the weekend of 28 and 29 February he was in the tavern described and observed fifteen to twenty-five tin-foil packets on the person of the bartender "Greg" and behind the bar. He also has been in the tavern on at least ten other occasions and has observed tin-foil packets on "Greg" and in a drawer behind the bar. The informant has used heroin in the past and knows that tin-foil packets are a common method of packaging heroin.
>
> 4. The informant advised me that over the weekend of 28 and 29 February he had a conversation with "Greg" and was advised that "Greg" would have heroin for sale on Monday March 1, 1976. This conversation took place in the tavern described. (A. 3)

Nowhere in this complaint are the patrons of the Aurora Tap even mentioned. The complaint does not allege that the informant ever saw a sale of narcotics to anyone, does not allege that a sale had ever taken place in the tavern, does not allege the name of anyone who might be purchasing narcotics, does not allege that the informant knew Ventura Ybarra or any other patron, does not allege that Greg, the alleged seller of narcotics, would be present in the bar on March 1, does not allege that any sale of narcotics would take place in the tavern, and does not allege at what time of day Greg would be selling heroin. Moreover, there was no showing in the complaint that anyone besides Greg who was connected with the tavern, nor any patron, ever sold or purchased narcotics in the bar or elsewhere, which is especially significant in light of the fact that there was no testimony that Greg was even present in the bar when the officers arrived. In short, the complaint for search warrant gave the police no reason to suspect any of the bar's patrons of any illegal activity.

In addition, the testimony of Officer Jerome Johnson, the officer who searched the patrons, indicates that he did not suspect, and had no reason to suspect, any patron of possessing a weapon or contraband. Johnson admitted that he had no indication that Venturra Ybarra or any other patron was violating any law (A. 28), and that he did not know any of the patrons and had not seen any of them before. (A. 26) Johnson also testified that Ybarra gave no indication of having a weapon (A. 27), made no gestures or other actions indicative of criminal conduct (A. 28), and did not act in any threatening manner. (A. 29) This testimony demonstrates that the pat-down of the patrons was not based on any reasonable or articulable suspicion, but was done simply as a matter of course.

Considering the facts outlined above, the authorities cited by the appellee do not support its assertion that the

pat-down in this case was permissible. The cases cited by the appellee have not adopted the *per se* rule suggested by the appellee; these authorities have generally required reasonable suspicion before a pat-down is permitted. Since the officers in this case had no suspicion at all, these cases actually support the appellant's position that the pat-down was improper. Likewise, while the interest in police safety is indeed a compelling one, that interest does not even come into play where, as here, the officers did not have any fears regarding the persons searched.[3]

What the appellee suggests in its brief is that, despite the absence of any reasonable belief that any of the patrons is armed or dangerous, a pat-down for weapons of all persons present is always permissible when police officers are executing a search warrant. This contention should be rejected, and the judgment of the Appellate Court should be reversed.

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[3]In any event, it is completely irrelevant that of the 27 cases selected by the appellee for inclusion in its brief, six involved the recovery of weapons, or that of the 60 raw police files examined by the appellee's *amicus curiae* (the accuracy of which cannot be established), 52% involved recovery of weapons. (Brief of appellee, p. 15) The appellee does not contend that these cases constitute a statistically accurate sample of any larger group, and thus they stand only for the proposition that the appellee and its *amicus* were able to find several instances where weapons were recovered during the execution of search warrants. Moreover, the appellee has failed to demonstrate that this danger to officers requires that officers be allowed to search for weapons without and articulable suspicion, or that the power already given to police officers by this Court in *Terry v. Ohio, supra*, is insufficient to deal with the problem. Neither the appellee nor the *amicus* has shown that the searches in the cases they refer to were made without probable cause or reasonable suspicion.

B. Even If the Initial Pat-Down of Ybarra and the Other Patrons Had Been Proper, Which It Was Not, the Second Search of Ybarra Was Not Justified.

As discussed in Argument IA, *supra*, the initial pat-down of Ventura Ybarra and all the other patrons of the Aurora Tap was impermissible. However, even if one assumes that this initial procedure was proper, the second search of Ventura Ybarra, which resulted in the discovery of contraband, was not permissible.

During questioning by defense counsel at the suppression hearing in this case, Officer Jerome Johnson testified that when he first patted down Ventura Ybarra, he found nothing upon him. (A. 28) However, on cross-examination he testified that he felt a cigarette pack with objects in it. (A. 32) Officer Johnson did not immediately seize this item or direct any other officer to do so. Instead, he proceeded to search all of the other patrons of the tavern. (A. 32) At trial, Officer Johnson testified that prior to this second search he had no knowledge that Ybarra had anything on his person that was violative of any statute. (A. 59)

Based on the above set of facts, the appellee contends that when Officer Johnson undertook the second search of Ventura Ybarra, he had probable cause to believe that Ybarra possessed the contraband described in the warrant. The basic flaw in the State's reasoning is the assumption that when Officer Johnson felt "a cigarette pack with objects in it" in Ybarra's pants pocket, this gave him probable cause to believe that Ybarra had some of the contraband for which they were searching. Clearly, Officer Johnson did not believe that Ybarra possessed any contra-

band, for he testified that prior to the second search he did not have any knowledge that Ybarra had any contraband on his person. (A. 59) Johnson could have reached no other conclusion, for it is not logical to infer from the possession of a cigarette pack "with objects in it" that those objects are contraband. Officer Johnson had no idea what the objects in the cigarette pack were. The objects could have been cigarettes, a lighter, or a book of matches. Johnson's honest admission that he did not believe that Ybarra had contraband on his person before the second search indicates that nothing in his experience as a police officer led him to believe that the cigarette pack contained contraband, and this statement by the officer is, contrary to the State's contention, entitled to great weight. (Brief of appellee, p. 19) Indeed, the observations or inferences of the officer who conducts the search have always been given paramount importance in determining the permissibility of searches. See, *e.g., Terry v. Ohio, supra,* 392 U.S. at 4-7. In this case, where the police officer admitted he did not believe that Ybarra had contraband, where the prosecutor at trial conceded that there was no probable cause (A. 39), and where the facts support the conclusion that probable cause did not exist, the appellee's contention to the contrary is meritless.[4]

[4]The appellee contends at page 19 of its brief that ". . . Agent Johnson was not given the opportunity during direct or cross-examination at the suppression hearing to itemize and explain all the factors which gave him probable cause to conduct the second search and retrieve the heroin packets from Ybarra's pockets". On the contrary, Agent Johnson had ample opportunity to explain his action.

In short, even had the initial pat-down been permissible, Officer Johnson lacked probable cause to justify the second search. The judgment of the Illinois Appellate Court which approved the search should therefore be reversed.

II

The Facts of the Instant Case Show That the Search of Ventura Ybarra Was Not Based On Probable Cause or Reasonable Grounds to Believe That He Was Connected to the Premises or the Criminal Activity Under Investigation, or That He Might Dispose of the Warrant's Objects. Thus, Regardless of How Other Cases May Have Construed *Ill. Rev. Stat.*, Ch. 38, Sec. 108-9 and Statutes Similar to It, the Application of That Statute To Permit the Search In This Case Violated the Fourth Amendment.

Argument II of the appellee's brief advances the proposition that the initial pat-down of Ybarra and all the other patrons was permissible not as a weapons frisk, but as a search for narcotics.

The appellee's extensive discussion of the law in this argument is irrelevant, once the facts are viewed in their true light. The appellee's argument is that Illinois cases have construed the instant statute so as to require a reasonable belief that the person searched poses a threat to the officers conducting the search, is concealing contraband, or is connected to the premises searched. The appellee notes that similar statutes have been so construed in other states. Appellant fails to see the relevance of these other cases,

The reason that "the factors which gave him probable cause" do not appear on the record is that it is obvious from Johnson's testimony that he did not have such probable cause. Indeed, at the suppression hearing, the prosecutor conceded that probable cause simply did not exist. (A. 39)

for here the Illinois Appellate Court did not, explicitly or implicitly, advance such a requirement in upholding the search of Ybarra. Instead, the Illinois Appellate Court used the statute to permit a search that was not based on probable cause, reasonable suspicion or any other objective standard. Regardless of how other courts have dealt with statutes such as this, the Appellate Court's interpretation of the statute brings it directly into conflict with the Fourth Amendment. The statute is thus unconstitutional as it was applied here.

The legal question to which the appellee addresses itself in Argument II of its brief is whether the search of a person present where a search warrant is being executed should be permitted only when the officers have probable cause to believe the person possesses the items being searched for, or whether some lesser degree of suspicion should suffice. Appellant contends that the probable cause standard should apply, but this question does not control the outcome of this case, for no matter how low a degree of suspicion is required, the search of Ybarra was impermissible. The appellee offers the following test:

> . . . this Court should employ the *Terry* balancing test to allow searches of persons on compact premises specified in the warrant[5], when there is information that drug trafficking is taking place at that location and the police have a reasonable belief that the persons present are connected with the criminal activity and are likely to be concealing the objects of the warrant in their clothing. (Brief of appellee, pp. 39-40)[6]

[5]The premises in this case were described as one *large* room. (A.59)

The fact relied upon by the State to support the proposition that the officers here had a reasonable belief that the persons present were connected with the criminal activity is that the patrons "were connected with the tavern by their choice to be present in a place where possession and sale of narcotics were rather open and notorious." (Brief of Appellee, p. 38) The assertion that narcotics dealing in the Aurora Tap was "open and notorious" is totally unsupported by the record. There is not the slightest evidence that the narcotics supposedly being dispensed there were in view of the patrons of this public place. The informant, in his complaint for search warrant, stated only that he observed tinfoil packets on the person of the bartender and behind the bar. He did not see them being sold to patrons, he did not see them out in the open, and he did not see them in the possession of anyone but Greg. The officers who arrived to execute the warrant saw no narcotics being

[6]At page 40 of its brief, appellee indicated that this would be only "a brief pat-down to discover forms in an individual's clothing which would give probable cause to believe he was carrying illicit drugs." Appellant fails to understand what use a pat-down would be in discovering contraband. While the form of a weapon is immediately apparent from the outside of clothing, the form of contraband is not. As this case demonstrates, almost any object felt through clothing *could* conceivably contain contraband, but almost any object could also have an innocent explanation. The feeling of an object which could contain contraband would not give the police probable cause to search further, and thus the pat-down will be useless to the police. Only a full search can result in the discovery of contraband, and probable cause should be required before such a search is permitted.

used or sold, and no narcotics were within the view of any of the patrons or the officers. In short, the idea that narcotics dealing was open and notorious at the Aurora Tap is wholly unsupported by the record in this case. And, as discussed previously at pages 7-12 of this brief and pages 10-13 of appellant's original brief, both the objective facts and the testimony of the searching officer make it clear that he had no suspicions of any kind regarding Ybarra or any other patron.

Since there are no facts which would give rise to reasonable suspicion that the patrons possessed narcotics, even this standard is not met. Appellant believes that if the officers sought to search any patron for narcotics, they could do so only if they had probable cause to believe that the patron was concealing narcotics. See *State v. Lewis*, 115 Ariz. 530, 566 P. 2d 678, 680 (1977). However, under any standard the intrusion in this case was not justified. The judgment of the Illinois Appellate Court should therefore be reversed.

CONCLUSION

For the reasons stated above, the search of Ventura Ybarra was a violation of the Fourth Amendment. The judgment of the Illinois Appellate Court should therefore be reversed.

Respectfully submitted,

RALPH RUEBNER,
Deputy Defender

ALAN D. GOLDBERG
Assistant Appellate Defender
Office of the State Appellate Defende
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel For Appellant

Of Counsel
MARY ROBINSON,
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE STATE OF MONTANA, AS AMICI CURIAE IN SUPPORT OF THE APPELLEE.

FRED E. INBAU, ESQ.,
WAYNE W. SCHMIDT, ESQ.,
FRANK G. CARRINGTON, JR., ESQ.,
JAMES P. MANAK, ESQ.,
Americans for Effective Law Enforcement, Inc.,
Suite 960,
State National Bank Plaza,
1603 Orrington Avenue,
Evanston, Illinois 60201,
Counsel for Amici Curiae.

Of Counsel:
RICHARD J. BRZECZEK, ESQ.,
Chicago Police Department,
1121 South State Street,
Chicago, Illinois 60605,
HON. MIKE GREELY, ESQ.,
Attorney General,
MARC F. RACICOT, ESQ.,
Assistant Attorney General,
State of Montana,
Helena, Montana.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the State Appellate Defender, Ralph Ruebner, Esq., and Alan D. Goldberg, Esq., Counsel for the Appellant, and by Hon. William J. Scott, Attorney General, State of Illinois, Melbourne A. Noel, Jr., Esq., Counsel for the Appellee. Letters of consent of both parties have been filed with the Clerk of this Court. States are not required to obtain consent to file as *amici curiae*.

INTEREST OF THE AMICI CURIAE.

I. General Interest of the Amici Curiae.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of the AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime.

The Illinois Association of Chiefs of Police, Inc., is a not-for-profit Illinois association and consists of over 600 members who are Illinois police chiefs and senior law enforcement executives. It, too, seeks to represent in our courts the concern of the average citizen with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their effort to protect public safety.

The Attorney General of Montana is the chief law enforcement officer of his state with oversight for the fair and effective enforcement of the criminal law therein. Montana has a statute similar to the Illinois statute involved in this case.

II. Special Interest of the Amici Curiae.

Our particular interest in this case arises from the important constitutional and policy questions involved in the Illinois Statute (Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9) and the particular facts of this case. It is our belief that such a statute is absolutely essential to the protection of police officers from attack while executing duly issued search warrants, and in preventing the disposal or concealment of evidence described in such warrants and the discovery of other contraband, including weapons. It is our belief that when measured against the requirements of the Fourth Amendment, such a statute is reasonable on its face, and in its application, including to the facts of this case. The existence of such statutes encourages police officers to utilize the constitutionally preferred procedure of submitting their facts for a premises search to a magistrate for a search warrant, see *U. S.* v. *Ventresca,* 380 U. S. 102 (1965). We further believe that such statutes are highly desirable as reasonable and proper tools of law enforcement and that affirmance of the opinion of the court below will encourage the states to enact narrowly drawn and applied statutes that will serve the interests of law enforcement and protect the privacy and personal integrity of our law-abiding citizens.

ARGUMENT.

I.

Introduction.

Illinois Bureau of Investigation agents obtained a warrant for a search of a tavern in Kane County, Illinois known as the "Aurora Tap" for "evidence of the offense of possession of a controlled substance to be seized therefrom: heroin, contraband and other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture processing and distribution of controlled substances." The Illinois Appellate

Court, Second District, in its opinion stated that ". . . in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs," 373 N. E. 2d 1013, 1015, although the accuracy of this statement is disputed by the appellant in his brief. The premises were described by the Appellate Court as "dismal, drab and shabby," consisting of one room.

Only twelve patrons were present when the State agents, assisted by local police, arrived. In addition to a search of the premises, the patrons were searched. During the initial pat down of the appellant an officer felt a cigarette package with objects in it. A second search of his person turned up six tinfoil packs of heroin.

Probable cause for the search warrant is not an issue in this case. Appellant contends that the Illinois statute providing that a person executing a search warrant may search any person in the place at the time to prevent the disposal of articles or things described in the warrant is violative of the Fourth Amendment as applied to him. The statute is set forth as follows:

> *Illinois Revised Statutes,* 1975, Chapter 38, Sec. 108-9
>
> Detention and Search of Persons on Premises. In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack,
>
> or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

The trial court denied appellant's motion to suppress, finding that the search in question was permissible under Section (b) of the statute. The Illinois Appellate Court affirmed this finding and the conviction, ruling that the statute, as applied to a search for articles or things described in the warrant, did not offend the Fourth Amendment. The Court made it clear that

such a warrant would not authorize a "blanket search" of persons or patrons found in "large" retail or commercial establishments.

> But in the case before us the search was conducted in a one room bar where it is obvious from the complaint of the officers seeking the search warrant that heroin was being sold or dispensed. 373 N. E. 2d 1013, 1018.

The opinion of the Appellate Court states that four other jurisdictions have similar statutes—Arizona, Kansas, Georgia and the District of Columbia—and the Court turned to several of the reported decisions of these jurisdictions, as well as Illinois, for construction of the statute and resolution of the constitutional issue.

A recent work by a distinguished authority on the Fourth Amendment notes that the courts of these states have upheld searches similar to that in the instant case on the basis of such statutes. La Fave, Search and Seizure, Vol. 2, p. 144 (1978). A 1973 Law Review Comment stated that eleven states at that time empowered the police, when executing a search warrant, to search all persons found on the premises described therein. Three such states granted this power through a specified form of warrant (Del., Mass., N. H.) while eight simply authorized the search without setting forth an "approved" form of warrant (Conn., Ga., Ill., Kan., Mont., Nev., N. Y., Wis.). Comment, 58 Cornell L. Rev. 614 (1973).

Thus, several jurisdictions have at various times sought to clarify police powers in searching persons present at the time and place of execution of a search warrant. The comments of the Illinois Revision Committee probably best summed up the common legislative intent running through these statutes when it stated:

> The Committee felt that this section is necessary because it gives the officer a clear outline of his power in executing the warrant and removes doubt from a rather cloudy area of the law. Revision Committee Comments to Ill. Ann. Stat. ch. 38, Sec. 108-9 at 271 (Smith-Hurd, 1970).

This attempt to clarify police powers in this area of Fourth Amendment rights, and to link it to the special protections surrounding a search warrant—as opposed to warrantless searches where no determination of probable cause for the initial search has been made by a magistrate—is submitted by *amici* to be a laudatory legislative activity that should be encouraged by the Supreme Court by a decision upholding the search in the instant case.

II.

The Appellant Was Not Entitled to Suppression of the Heroin Seized from His Person, as the Police Officers Would Have Been Fully Justified in Searching Him Under the Facts of This Case Even Without the Statute.

The record from the preliminary hearing and trial indicates that when the police arrived at the Aurora Tap they announced their purpose and advised the 12 patrons that they were going to make a cursory search for weapons. No patrons were allowed to leave and no one was permitted to enter while the search took place. Appellant was patted down by Agent Johnson who stated that he felt a cigarette pack with objects in it. A second search of appellant two or three minutes later resulted in the removal of six tin foil packets of heroin from his pocket. Agent Johnson described his search of the appellant as "more or less a pat down, cursory search for weapons for our protection."

Under the rule of *Terry* v. *Ohio*, 392 U. S. 1 (1968), the police may take appropriate self-protective action when performing their duty in potentially dangerous situations. While *Terry* involved a stop and frisk in a typical street encounter setting, its rationale is equally applicable to situations where the police are executing a search warrant, and it is submitted that its sweep should be significantly broader in the latter cases.

Under *Terry* the self-protective search is limited to a pat-down of the suspect's outer clothing and a seizure of only hard objects whose size and shape give the officer probable cause

to believe that the suspect is armed. Obviously a police officer executing a search warrant has placed himself in a unique zone of danger. Persons at the scene may be potentially dangerous, since they may be powerfully motivated to conceal evidence of a crime, assault or kill the officer to prevent arrest, or seek to escape. The analogy to *Terry* is appropriate and the pat-down authority is clear.

However, what if the pat-down does not indicate the existence of an object that could be a weapon, but indicates that it might be the type of evidence specified in the warrant? Are the police then powerless to act? This seems manifestly absurd. It would seem that if the police have come by their information through purely proper means (the pat-down for their self-protection), then they should not be required to ignore the presence of the very evidence specified in their warrant, as to which they have a *duty* laid upon them by the command of a magistrate to search for and recover such evidence. Ignoring such evidence and failing to seize it forthwith would be a violation of that duty.

This was the case in *State* v. *Yarbrough*, 26 Or. App. 481 (1976), where the police were executing a search warrant for balloons of heroin. In their pat-down of the defendant who was at the scene, it was concluded by the police that an object felt on his person was not a weapon but was apparently one of the items listed in the search warrant. They seized it and the search was ruled proper.

In the instant case the warrant was for "heroin, contraband and other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture processing and distribution of controlled substances." Even members of the general public are by now familiar with the fact that such objects are frequently carried by criminals in cigarette packs, and certainly the police are aware of this. *U. S.* v. *Robinson*, 414 U. S. 218 (1973). When Agent Johnson conducted the pat-down of appellant, which he was entitled to do under *Terry*, and felt the cigarette pack, he had probable cause to believe

that appellant possessed evidence named in the warrant and was entitled to seize it.

It is submitted, however, that a more extensive patdown of suspects in search warrant execution cases should be allowed by this Court than would be permitted by *Terry* in the typical street encounter. The limited patdown of outer clothing permitted by *Terry* was tailored to the conditions of a one-on-one confrontation where the officer is focusing his attention upon one suspect. Under these conditions the suspect has relatively fewer opportunities to bring a weapon to bear against the officer. In a search warrant execution situation, however, the suspect will have more opportunities to reach into a pocket, purse, or bag while the police concentrate on moving about the premises to conduct the search. The primary focus of the police is the premises, not the persons on the premises. A search of premises is at best an arduous task calling for concentration free from distractions, and it allows the persons on the premises ready opportunities to do harm to the officers, unless such persons can be effectively neutralized.

It has been pointed out that it may be asked whether it is even necessary for the police to be able to point to specific and articulable facts tending to connect the person present at the scene of a search pursuant to a warrant with the criminal activity under investigation, or whether something less should suffice. LaFave, Search and Seizure, Vol. 2, p. 150 (1978). Perhaps it should be sufficient that the criminal activity that is the object of the search warrant is serious and that the person to be frisked is connected with the place where the criminal activity is taking place or evidence thereof is found pursuant to the warrant. As stated in *People* v. *Finn*, 73 Misc. 2d 266 (N. Y. 1973), it is "generally known by the police and others that those who traffic in large quantities of narcotics are often armed."

The mere presence of such persons should, as noted in *Finn*, be sufficient to give rise to sufficient and legal justification for the police to frisk all persons present for weapons, although *Finn*

involved the search of persons in an apartment, and *amici* do not argue for a rule broader than that which would be appropriate for the facts in the instant case, i.e., in relatively small premises, with a limited number of persons within the zone of danger to the police, and excluding large commercial or retail establishments.

Thus, it is submitted that a lesser showing that a person to be frisked "may be armed and presently dangerous" should suffice in these cases than would be required by *Terry* for a typical street confrontation. And when such a frisk reveals the presence of an object that the police reasonably believe may be an object specified in the search warrant, they should be permitted to complete their search and seize the object.

III.

A Statute Authorizing a Person Executing a Search Warrant to Search Any Person in the Place at the Time to Protect the Police from Attack or to Prevent the Disposal of Evidence Does Not Violate the Fourth Amendment on Its Face, or as Applied to the Facts of This Case.

As noted *supra*, Section (a) of the statute is no more than a codification of existing common law principles enunciated in *Terry* v. *Ohio*, 392 U. S. 1 (1968), and related cases, permitting the police to take appropriate self-protective action when executing a search warrant.

On the other hand, the legislative intent of the Illinois draftsmen with respect to Section (b) is best set forth in the Illinois Revision Committee comments:

> In addition it is clear that the purpose of the warrant would be thwarted were not the officer given the second power found in subsection (b), i.e. to search the person for the things to be seized. The need for this power arises most often in the narcotics cases where disposition is most easily effected. Ill. Ann. Stat. ch. 38, Sec. 108-9, Revision Committee Comments at 271 (Smith-Hurd, 1970).

This Section, on its face, and as construed by the Appellate Court, would not permit the search of all persons present upon public premises during execution of a search warrant merely because of their presence on the premises. The Court was careful to carry out the legislative intent by limiting application of the Section to situations such as those in the instant case where, because of the size of the premises, the type of evidence sought, and the number of persons present at the scene when the police arrived, there would be probable cause to believe that evidence which might be concealed or destroyed was on the persons of those present. So construed and applied, such a statute can not be considered as one permitting a constitutionally proscribed general search, see *Willis* v. *State,* 122 Ga. App. 455 (1970), *Kansas* v. *Loudermilk,* 208 Kan. 893 (1972), and *U. S.* v. *Graves,* 315 A. 2d 559 (D. C. App. 1974). As the Illinois Appellate Court stated:

> Such a warrant obviously would not authorize a "blanket search" of persons or patrons found in a large retail or commercial establishment. But in the case before us the search was conducted in a one room bar where it is obvious from the complaint of the officers seeking the search warrant that heroin was being sold or dispensed. *People* v. *Ybarra,* 373 N. E. 2d 1013, 1016.

It is submitted that facially, and as construed by the Appellate Court, the statute does no more than incorporate a police officer's common law powers to take self-protective action when executing a search warrant, and a probable cause-reasonableness standard with respect to the search of persons found on the premises at the time of the search.

Amici are aware of no reported appellate decisions that have construed or applied like statutes beyond the constitutional parameters of the Fourth Amendment. The most recent decision concerning such a statute is *Patton* v. *State,* ..... Ga. App. ....., 252 S. E. 2d 678 (1979). In that case the police possessed a search warrant for marijuana for the residence and person of one "Tommy Last Name Unknown". Upon their

arrival on the premises they found several other persons, including the defendant. Defendant was directed to empty his pockets on a table, a search that was permissible under Ga. Code, Section 27-309(b), which is similar to Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9(b). When defendant did so, it was apparent that he did not have marijuana on his person but he did have pills contained in a plastic bag. Based upon his experience the officer believed that the pills were illegal drugs and the Georgia Court ruled that they could be seized under the Plain View Doctrine.

IV.

Such a Statute Is Necessary and Desirable to Law Enforcement in Order to Prevent the Disposal or Concealment of Evidence, Including Weapons.

Amici wish to demonstrate the practical ramifications of a statute such as Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9 to legitimate law enforcement activity, not only from the standpoint of the protection of police officers involved in the execution of search warrants by the discovery and confiscation of weapons, but the collection of evidence specified in such warrants and other contraband that might otherwise be lost due to its concealment upon the persons of individuals present when search warrants are executed.

With the cooperation of the Chicago Police Department we examined the files of over 60 cases where search warrants were executed with the attendant use of the Illinois statutory procedure to search persons present on the premises. These cases included fact situations involving a search of a limited number of persons on public premises not unlike those involved in the instant case, as well as private premises, including houses and apartments. Most warrants were for narcotics and related paraphernalia, while some were for gambling implements and related paraphernalia. In most cases evidence specified in the warrant

was seized as a result of the personal searches. In many cases weapons were seized. Several representative cases are presented here with a brief narration of the pertinent facts. Each case is identified by the official Chicago Police Department Records Division Number.

X 708253

This case involved a search warrant for an apartment and a named individual for narcotics. Upon arrival the police found nine persons present. All were searched: two were arrested when narcotics were found on their persons; two were arrested when weapons were found on their persons; five were released without charges.

A 703672

This case involved a search warrant for a store front and a named person for gambling paraphernalia. Two other persons found on the premises were searched, in addition to the person named in the warrant, with the police finding $100, $300, and $374 in horse bets on the individuals respectively.

Z 722653

This case involved a search warrant for a record shop and a person for narcotics. A search of the named person, the premises and a second person found on the premises all uncovered narcotics.

Z 713146

This case involved a search warrant for a Race Track Messenger Service and an arrest warrant for a named individual. When the search warrant was executed, a large number of race horse bets and pari-mutuel lottery wagers were found on a table. The named suspect was arrested. Another person found on the premises was searched, turning up race horse bets and $1,100 in currency.

P 726675

Here the police had a search warrant for an apartment for narcotics and another search warrant for a person at the apartment. In addition to the named person, several other

persons were found on the premises. A search of the named suspect and three other persons uncovered various quantities of controlled substances and unregistered firearms, including a revolver and an automatic weapon. A search of four other persons on the premises revealed no narcotics, other contraband, or weapons and these persons were not charged with any crime.

A 703464

Here the police had a search warrant for a residence and its lessee. Upon arrival the lessee and five other persons were found on the premises. The police were required to use force to gain entry when the occupants refused to open the door. All persons were searched and a quantity of narcotics was found on four persons and on the premises.

A 703426

This case involved a search warrant for an apartment for narcotics. Six persons were present and searched, three having narcotics on them, for which they were arrested on possession charges.

Y 701990

This case involved execution of a search warrant for a residence after investigators made a controlled buy on the premises. When the warrant was executed the police found five persons on the premises. Marijuana was found on three of the persons.

Z 717069

This case involved a search warrant for second and third floor apartments for narcotics and a named person. A search of the named person and two other persons found in the apartments revealed a quantity of narcotics. A loaded revolver was also found on the premises.

Z 700216

This case involved a search warrant for a bar, a patron and the bartender for narcotics. Six patrons and the bartender on the premises were searched and various quantities of narcotics and weapons were found on their persons.

It is submitted that these typical cases demonstrate the necessity and desirability of the power to search persons at the scene of the execution of a search warrant to protect police officers and to prevent the disposal or concealment of evidence or contraband. In the words of the Illinois Revision Committee, codification of this power ". . . is necessary because it gives the officer a clear outline of his power in executing the warrant and removes doubt from a rather cloudy area of the law." Revision Committee Comments to Ill. Ann. Stat. ch. 38, Sec. 108-9 at 271 (Smith-Hurd, 1970). We agree, and respectfully submit to this Court that its affirmance of the appellant's conviction will give the states the encouragement they need to enact similar statutes that, in effect, protect individual rights in this important Fourth Amendment area by articulating the exact scope and extent of police search powers while executing search warrants.

CONCLUSION.

Appellant's conviction should be affirmed. The search of appellant was fully justified even without the statute in question. The statute passes constitutional muster on its face and as construed by the Appellate Court and as applied to the facts of this case. Such statutes are necessary and desirable to effective law enforcement and will be encouraged by the Supreme Court's affirmance of appellant's conviction in this case.

Respectfully submitted,

FRED E. INBAU, ESQ.,
WAYNE W. SCHMIDT, ESQ.,
FRANK G. CARRINGTON, JR., ESQ.,
JAMES P. MANAK, ESQ.,
Americans for Effective Law
Enforcement, Inc.,
Suite 960,
State National Bank Plaza,
1603 Orrington Avenue,
Evanston, Illinois 60201,
Counsel for Amici Curiae.

Of Counsel:

RICHARD J. BRZECZEK, ESQ.,
Chicago Police Department,
1121 South State Street,
Chicago, Illinois 60605,

HON. MIKE GREELY, ESQ.,
Attorney General,

MARC F. RACICOT, ESQ.,
Assistant Attorney General,
State of Montana,
Helena, Montana.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA,
Appellant,

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

QUIN DENVIR
State Public Defender of California
LAURANCE S. SMITH
RICHARD S. KESSLER
SUSAN L. BURRELL
Deputies State Public Defender
455 Capitol Mall, Suite 360
Sacramento, California 95814
(916) 322-5298
Attorneys for Amicus Curiae

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA,
Appellant,
v.
PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have substantial impact upon the rights of many persons being represented by this office, as well as upon the public as a whole, to be free from unreasonable searches and seizures of their persons. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of the appellant herein.

This brief is filed pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Consent to the

filing of the brief has been given by the Office of the State Appellate Defender of Illinois and by the office of the Attorney General of the State of Illinois, counsel for appellant and appellee, respectively. Letters reflecting such consent have been forwarded to the Clerk of this Court under separate cover, and should be on file in his office.

ARGUMENT

I

THE ILLINOIS STATUTE UNDER REVIEW, AS IT HAS BEEN CONSTRUED BY THE ILLINOIS COURTS, OPERATES TO CONVERT EVERY SEARCH WARRANT INTO A GENERAL WARRANT WHICH AUTHORIZES ARBITRARY SEARCH OF PERSONS WITHOUT REASONABLE CAUSE, THEREBY DIRECTLY CONTRAVENING THE FOURTH AMENDMENT

Introduction

On March 2, 1976, an Illinois magistrate was presented with an application for a search warrant which averred that a number of tinfoil packets containing heroin had been seen by a reliable informer upon the person of one "Greg", the bartender at a tavern known as the Aurora Tap. The application further alleged that "Greg" had announced he would have some heroin for sale on Monday, March 1, 1976.

The Magistrate accordingly issued a warrant commanding any peace officer to search ". . . the following person or place: 79 S. LaSalle, Aurora, Illinois, which is called the Aurora Tap Tavern . . .

. . . also, the person of "Greg", the bartender . . ." The object of the search was the recovery of evidence of possession of heroin as well as instrumentalities used in its sale.

The application for the warrant did not set forth any ground for belief that evidence of the offense would be found upon the person of appellant Ybarra or any of the tavern's customers; authority to search customers was

neither requested nor granted.

An Illinois statute, however, purports to grant authority to search the persons of individuals found in premises described in a warrant, regardless of the circumstances:

> "[I]n the execution of the warrant the person executing the same may be reasonably detain to search any person in the place at the time (a) to protect himself from attack; or, (b) to prevent the disposal or concealment of any instruments, articles, or things particularly described in the warrant" (Ill. Rev. Stat. (1975), Ch. 38 § 108–9).

Acting pursuant to the authority granted by the statute—not the warrant—appellant Ventura Ybarra, a patron, was subjected to a thorough search of his person *after* a cursory patdown for weapons had produced negative results. Thus, though there appears no evidence that Ybarra was either likely to attack the searching officers nor that he was attempting to conceal or dispose of evidence, the Illinois appellate court held the search of Ybarra to be authorized by the terms of the statute (*People v. Ybarra,* (Ill.App. 1978) 373 N.E.2d 1013).

By holding the search of Ybarra to be authorized by the statute, the state court has authoritatively construed that statute to vest absolute discretion in searching officers to search *any* person present in premises described in a warrant *regardless* of the circumstances. The state court has also held such practices to be sanctioned by the Fourth Amendment. (373 N.E.2d at 1017)

Perhaps an unspoken premise of the state court's opinion was that the search was somehow justified by its description of the tavern as a "dismal, drab and shabby type of establishment consisting of one room" (373 N.E.2d at 1014). The Fourth Amendment, however, does not make a distinction between "drab" taverns frequented by the poor and the most elegant restaurant or private club; moreover, it is highly dubious under the Fourteenth whether poverty can be implicitly equated with criminality.

If the Illinois court's view of the Fourth Amendment is upheld by this Court, then any man or woman who enters a public establishment, however humble or exclusive it may be, might find himself subjected to a full search of his person should the authorities have cause to suspect that the bartender was taking bets or that the headwaiter was peddling contraband.

Thus, the major vice of the Illinois court's opinion is that it construes the federal constitution without taking into account that a court engaging in constitutional construction must always "be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert . . . a principle of the fundamental law of the land" (*Dimick v. Schiedt,* (1935) 293 U.S. 474, 485).

The fundamental principle which is weakened and subverted by the inevitable application of the Illinois court's holding is, of course, the right of every person to be free from search and seizure unless there are reasonable grounds for suspecting him to be in

possession of evidence or instrumentalities of crime.

As this Court recently suggested in *Zurcher v. Stanford Daily* (1978), ___U.S. ___ [98 S.Ct. 1970], "[w]arrants shall describe with particularlity the individuals or places to be searched and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that . . . the things [searched for] will be in possession of the individuals to be searched" [98 S.Ct. at 1978].

As the Court also recognized in the *Stanford Daily* case, *supra,* "[t]he struggle from which the Fourth Amendment emerged 'is largely a history of conflict between the Crown and the press' ", ___U.S. at___, [98 S.Ct. at 1981]. However, as *Dimick v. Schiedt, supra,* makes clear, a constitutional holding will have applicability to many fact situations unlike that of the case which led to its pronouncement. Thus, if the Illinois statute were sustained, there would be a grave danger that third-party searches without probable cause would be perpetrated against persons exercising rights expressly enumerated elsewhere in the Bill of Rights, as well as those simply enjoying food and drink in a public tavern.

For example, one very disturbing indication of the ease with which third-party searches can be converted into wholesale assaults upon constitutionally protected interests is seen in a recent raid upon the offices of a large and highly respected Los Angeles law firm by officers dispatched by the California Attorney General. Armed with an overbroad warrant, they reportedly

ransacked the firm's files, searched the purse of a female attorney, and attempted to cart off several boxes of client records before the search was halted by a temporary restraining order. See "Judge Assails Conduct In Search", The *Los Angeles Times,* April 13, 1979, Pt. II, p. 1.

In the following pages we shall discuss and summarize some of the historic abuses of individuals which provided the genesis of the Fourth Amendment, comparing them to the facts here. We shall then engage in a discussion of the reasoning advanced by this Court and by the many state courts which have dealt with searches of third parties who have been present under a variety of circumstances at a location being searched. Demonstrating a clear weight of authority against searches of persons who, as here, are merely found in places lawfully open to the public, we conclude that arbitrary searches authorized by the Illinois statute are prohibited by the Fourth Amendment.

(A) The History of the Fourth Amendment is a History of Resistance to the Granting of Unbridled Discretion to Government Officers as to Whom and Where to Search.

That the right of citizens to be free from arbitrary search and seizure is one of the most fundamental components of a free society is shown by its origin in the Magna Charta (N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937) 13–14 [hereinafter "Lasson"]; Schwartz, *The Great Rights of Mankind,* (1977)

[hereinafter "Schwartz"] 2–8).

Chapter 39 of the Magna Charta declares:

> "No freeman shall be taken or [and] imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by lawful judgment of his peers or [and] by the law of the land."

As is well documented by history, this provision was the result of the King's having arbitrarily imprisoned or seized the property of freemen who had merely displeased him (2 J. Lingard, *History of England* (London, 1849), 355–356; Lasson, *supra* at 20). Chapter 39 would be cited by Lord Coke and others centuries later as the basis of many of the liberties he sought to have recognized as the rights of Englishmen (Lasson, *supra*, at 21; *Schwartz, supra,* at 6–7).

Prior to the establishment of the American colonies, there were a series of confrontations centering about the king's use of arbitrary search and seizure as a means of enforcing laws against seditious literature.

The origin of the so-called general warrant can be traced to the sixteenth century, when Henry VIII created a licensing system for literature (F. Siebert, *Freedom of the Press in England*, 1476–1776 (1952) 48 [hereinafter "Siebert"]; Landynski, *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation,* (1966) 21 [hereinafter "Landynski"]. To enforce this scheme, the Court of the Star Chamber authorized the Stationers' Company, a private guild of printers, to appoint wardens who had authority to search all packs and trunks entering the country, and to

search at whim any warehouse, shop, or other place for evidence of contraband literature day or night (Landynski, *supra* at 21, 23; Lasson, *supra*, at 25, and sources there cited). The warrants executed by the stationers' wardens were "so general that they could be issued upon the merest rumor with no evidence to support them . . ." (Lasson, *supra*, at 26).

By the seventeenth century, the scope of arbitrary searches had extended far beyond the suppression of seditious literature. Under King James I, for example, the infamous writ of assistance was invented. Later codified under Charles II ([statute] 13 and 14 Car. II Ch. 2), the writ of assistance, which constituted *carte blanche* to officers to search anything at any time, was used to search for contraband which had been smuggled or upon which taxes and duties had not been paid (Lasson, *supra*, at 28). Today, much contemporary drug law enforcement is carried out through the tax and commerce powers (*See*, e.g. 21 U.S.C. § 960).

Resentment against the arbitrary means used to enforce the law began to grow, however. For example, after Charles II had issued new proclamations against sedition, and his Chief Justice (Scroggs) had issued general warrants to enforce them, Scroggs was subsequently impeached by Parliament. One of the articles of impeachment specified that Scroggs had issued "general warrants for attacking the persons and seizing the goods of his majesty's subjects *not named or described particularly in the said warrants*, by means thereof many . . . have been vexed, their houses

entered into and they themselves greviously oppressed . . ." (Lasson, *supra*, at 38 [emphasis added]). Also, following the revolution of 1688, King William abolished a tax scheme known as "hearth money" because its enforcement had resulted in too many arbitrary searches (*Ibid, citing* 1 Wm & M. Ch. 10).

Another significant event came in 1762 when Secretary of State Lord Halifax issued a general warrant to four officers directing them "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers" Lasson, *supra*, at 44). The messengers proceeded to arrest at least 49 persons in three days:

> "Armed with their roving commission, they set forth in search of unknown offenders, and unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect" (2 May, *Constitutional History of England,* 246–247).

In a subsequent suit for false imprisonment brought as a a result of these raids, Chief Justice Pratt held the warrants illegal, declaring, "To enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour" (*Huckle* v. *Money,* (1763) 2 Wils. K. B. 206, 95 Eng. Rep. 768).

In another, connected case, Pratt also remarked:

> "The defendants claimed a right under precedent to force persons' houses, break open escritoires, seize their papers, upon a general warrant, where no inventory is made of the things taken away, and *where no offenders' names are specified in the warrant,* and therefore a discretionary power given to messengers to search wherever their suspicions make chance to fall. If such power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the persons and property of every man in this kingdom, and is totally subversive of the liberty of the subject. If higher jurisdictions should declare my opinion erroneous, I submit as will become me, and kiss the rod; but I must say I shall always consider it as a rod of iron for the chastisement of the people of Great Britain" (*Wilkes* v. *Wood,* 19 How. St. Tr. 1153, 1167 (1763)). (Emphasis added).[1]

In 1765, Pratt, now elevated to the peerage as Lord Camden, heard the case of *Entick v. Carrington* (1765), 19 How. St.Tr. 1029. About the time of the Wilkes search, Lord Halifax had also issued a warrant to messengers to search for John Entick, the author of the *Monitor or British Freeholder,* and to seize him with his books and papers. The messengers liberally construed the warrant, ransacking Entick's home for four hours, and Entick brought suit. Lord Camden's landmark opinion

[1] Wilkes, it seemed, had refused to obey the warrant as his name was not on it, calling, "a ridiculous warrant against the whole English nation." He was carted off to Halifax's office in a chair while his home was ransacked. He was committed to the Tower of London after refusing to answer questions (See I. Brant, "The Bill of Rights; Its Origin and Meaning" (1965)).

condemned both the use of general warrants and the practice of searching "for evidence" with or without a warrant:

> "If this point should be decided in favor of the Government . . . the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel . . . (*Ibid* at 1063)."

In response to these decisions[2] and to popular sentiment on the subject, the House of Commons resolved in 1766 that general warrants in libel cases were illegal. Spurred on by the eloquent debating of William Pitt, the House subsequently declared all general warrants to be invalid.[3]

The battle against arbitrary searches was far from over, however. Around 1760, in order to enforce laws restricting the importation of foreign molasses into the American colonies, the Crown began employing writs of assistance. These writs allowed customs officers to arbitrarily enter and search buildings for smuggled

[2] Also in 1765, Lord Mansfield of the Court of the King's Bench spoke out against general warrants, rejecting an appeal from the successful suit of one of the printers involved in the Wilkes search. Mansfield opined that despite the sanctions of the Secretary of State and the long authority of the Star chamber, such uncertain warrants were void. Other justices in the case agreed that "no degree of antiquity can give sanction to a usage bad in itself" (*Leach v. Money*, 19 How. St. Tr., 1002, 1027 (1765); Landynski, *supra* at p. 29).

[3] Lasson, p. 49; 16 Hansard's *Parliamentary History of England*, 207 ff.; Landynski, *supra*, p. 30.

goods (1 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (1978), § 1.1, p. 4). These writs were even more ominous than the general warrants. General warrants were at least tied to a particular libelous incident and were therefore limited in time and object. Writs of assistance, on the other hand, gave absolute discretion to the official for the life of the sovereign under whom they were issued. The officer was empowered to search virtually at will (Lasson, *supra*, at p. 54; Landynski, *supra*, at p. 31).

Following on the heels of the 1760 order that trade laws be strictly enforced, George II died. All writs of assistance automatically expired six months later, in 1761. A group of Boston merchants then petitioned the court for a hearing on whether new writs would be issued (Landynski, *supra* at p. 33). Jeremiah Gridley, the Attorney General of Massachusetts Bay, argued on behalf of the customs officers that there was authority for issuance of writs in the colonies under statutes passed under Charles II and William III (Landynski, at 32). Gridley was audacious enough to add that the writs were beneficial as a "check on arbitrary authority since a sheriff was required to accompany customs officers on searches" (Landynski, at pp. 33–34).

James Otis, on behalf of the merchants, responded with a spectacular denunciation of England's colonial policy and of general warrants.[4] Otis saw the writs as

[4] See *Paxton's Case* (1761), in J. Quincy, Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, 1761–1772, p. 51 (1865) (hereinafter "Quincy").

"the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book," insofar as they placed "the liberty of every man in the hands of every petty officer" (2 *The Life and Works of John Adams* (1856) 523; see also, T. Cooley, *A Treatise on Constitutional Limitations,* (8th Ed. 1927) pp. 301–303). Notwithstanding the appeal of Otis' presentation, however, the court, led by Justice Hutchinson, sustained the legality of the writs.

Despite the momentary setback posed by Hutchinson's decision, the momentum created by Otis' opposition to the writs grew. Otis himself was elected to the Massachusetts General Assembly where he continued to be an outspoken critic of the writs. During his term, the legislature passed a bill which attempted to abolish the general writ of assistance, although the governor struck it down as contrary to the law of William III (Lasson, at p. 66; Quincy, at p. 499). The Massachusetts Assembly also attempted to withhold Hutchinson's salary and Hutchinson suffered other reprisals during the course of the Revolution (Quincy, *supra,* at 416).

Later, in 1772, a Massachusetts committee of twenty-one wrote a tract entitled "Infringements and Violations of Rights" which, at the instance of James Otis, decried the general search powers of customs officers (Lasson at 72; *citing Sources and Documents Illustrating the American Revolution,* 1764–1788 (Oxford 1923) p. 74.) Also, Connecticut refused to honor royal writs of assistance on the grounds they were

"unconstitutional." Most colonial governments rarely or never issued general writs of assistance under their own authority (Lasson at pp. 75–76; Landynski, at pp. 36–37).

Other indications of the abiding determination of early Americans to curb the discretion of searching officers is found in the various states' Bills of Rights which were drafted during the Revolution. For example, Art. X of the Virginia Bill of Rights provided,

> "That general warrants whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, *or to seize any person or persons not named,* or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not be granted" (2 B. Poore, *Federal and State Constitutions* (Washington 1877) p. 1909). (Emphasis added.)

At least six other state declarations or bills of rights followed Virginia by including some provisions as to search and seizure (*Id;* Lasson, at pp. 81–82).

During the ensuing debate over ratification of the Constitution, omission of a bill of rights was perhaps the most frequently stated reservation, becoming a rallying cry of the anti-federalists (Lasson, at pp. 88–89). In the Virginia ratification convention, Patrick Henry pointed in particular to the potential excesses of sheriffs searching at the instance of distant officials:

> "When these harpies are aided by excisemen, who may search, at any time, your houses and most secret recesses, will the people bear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power

with a niggardly hand; and here there is a strong possibility that these oppressions shall actually happen" (J. B. McMaster, *Pennsylvania and the Federal Constitution* (1888) 58).

In the same vein, Mason criticized the lack of any restraint on governmental overreaching in the original constitution:

". . . The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bonds" (3 Elliott's Debates, *supra,* pp. 445–449).[5]

Conclusion to Part A

From the above synopsis of history, it can be seen that while of course many specific interests have been involved in the people's long resistance to arbitrary searches, the common thread underlying that resistance is the feeling that officers enforcing statutory law ought not be given unbridled authority to decide for themselves who or what to search in order to do so.

The Illinois statute under review here, when set in

[5] Though the Constitution was initially ratified without a bill of rights, recognition of popular sentiment impelled President Washington to refer to the need for amendments in his inaugural address (10 *Writings of George Washington* (W. C. Ford Ed. 1891) 385–386; *Inaugural Addresses of the Presidents* (1961) 3).

relief against the historical backdrop painted above, will easily be seen to be afflicted with the exact vice which has been the cause of the struggle which culminated in the Fourth Amendment.

B. *The Clear Weight of American Authority Holds Searches of Third Parties, Where There Is No Probable Cause With Respect to Them, Are Unlawful.*

1. *Decisions of This Court Have Consistently Emphasized the Requirement of Specificity in Search Warrants and the Objective of Having Judicial Officers Rather Than Police Officers Determine The Reasonableness of a Search*

This Court has long emphasized the requirement of specificity in search warrants so as to minimize the discretion of law enforcement officers in determining the scope and conduct of searches. In *Marron v. United States*, 275 U.S. 192, 196 (1927), Mr. Justice Butler, speaking for a unanimous Court, declared:

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

In *Johnson v. United States*, 333 U.S. 10, 13–14 (1948), Mr. Justice Jackson provided the classic statement of the Fourth Amendment objective of limiting the discretion of the police in conducting searches:

"The point of the Fourth Amendment, which is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences

be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence, sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

See also *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971); *McDonald v. United States*, 335 U.S. 451, 455–456 (1948).

In *United States v. Di Re*, 332 U.S. 581 (1948), the government conceded the position advocated here by the State of Illinois and upheld by the Illinois appellate court. *Di Re* involved a prosecution for knowingly possessing counterfeit gasoline ration coupons. After being told by an informant that he would be purchasing ration coupons from one Buttita at a specified location, the police followed Buttita's car to the appointed place. Officers approached the car and found the informant in the back seat holding two counterfeit gasoline coupons in his hand. The informant told police that he had obtained the coupons from Buttita. Di Re, who was seated in the passenger side of the front seat, was arrested and searched. Counterfeit coupons were found on his person. Stressing the fact that the transfer of a ration coupon would not itself suggest illegality and also

that the transaction took place on a public street in daytime, this court held that there was no probable cause to search Di Re. Responding to the government's argument that search of a passenger in an automobile was justified as incident to the right to search the vehicle without warrant upon a showing of probable cause, the court stated:

"The government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband of his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the government disclaims the right to search occupants of a house, we suppose the government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without warrant confers greater latitude to search occupants than a search by warrant would permit?" [332 U.S. at 587]

The principle underlying *Di Re,* that mere presence at the scene of suspected criminal activity, without more, does not constitute probable cause to search, was reaffirmed in the arrest context in *Sibron v. New York,* 392 U.S. 40 (1968).

"The inference that people who talk to narcotic addicts are engaged in the criminal traffic—is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security" (392 U.S. at 62).

Finally, as the Court noted earlier this term, the Fourth and Fourteenth Amendments are indeed implicated in the search of persons abroad in public. These amendments require ". . . at a minimum, that the facts upon which the intrusion is based be capable of measurement against 'an objective standard' . . . [in order to assure that] the individual's expectation of privacy is not 'subject to the discretion of the official in the field' . . . (citations omitted).

". . .[P]eople are not shorn of all Fourth Amendment protection when they step out of their homes onto the public sidewalks.[6] Nor are they shorn of those interests when they step from the sidewalks into their automobiles" *Delaware v. Prouse* (1979), __U.S.__ [99 S. Ct. 1391, 1396–1397, 1401].

It should follow easily that neither are people shorn of Fourth Amendment protection when they step from their auto or a sidewalk into a public tavern.

[6] That the Illinois courts' interpretation of the Fourth Amendment results in violation of the precepts reiterated in *Prouse* is shown by the fact that Illinois cases have been relied on by the courts of Kansas to sanction the search of a person who was doing no more than standing on the public curb in front of a house for which officers had a warrant *(State v. McClelland* (1974), 215 Kan. 81, 523 P. 2d 357).

2. The Concept That a Search Warrant for Premises Does Not Automatically Justify a Search of All Persons Present Was Well Established in American Law Even Before Application of the Fourth Amendment to the States.

The government's concession in *United States v. Di Re, supra,* that police officers, armed with a search warrant for a residence only, could not search all persons found in it, is not surprising in light of other decisions to the same effect predating both *Di Re* and the incorporation of the Fourth Amendment into the Fourteenth in *Wolf v. Colorado* (1949), 338 U.S. 25 and *Mapp* v. *Ohio* (1961), 367 U.S. 643.

In *Purkey v. Mabey,* 33 Ida. 281, 193 p. 79 (1920), the Idaho Supreme Court considered a damage action for an assault alleged to have been committed on appellant by a sheriff acting under the authority of a search warrant. The warrant was issued to respondent sheriff to search one Bank Cigar Store for intoxicating liquors. Appellant was neither the owner nor an employee of the cigar store; rather, he was a mere bystander. While executing the search warrant, the sheriff proceeded to search the person of appellant. The trial court instructed the jury to return a verdict for respondent. In reversing the judgment and remanding the case for further proceedings, the Idaho Supreme Court stated:

"The right protected by the above provision of our Constitution has been deemed of so great importance that a similar provision is found in the Constitution of the United States and in the Constitution of nearly every state in the Union. Under such constitutional provisions, it is uniformly held that the search warrant must conform strictly to

> the constitutional and statutory provisions providing for its issuance. It must contain a description of the premises to be searched. No discretion must be left to the officer executing the warrant as to the premises which he is authorized to search."

The court held that a warrant issued for the search of a place where there was probable cause to believe that intoxicating liquors were dispensed in violation of law could not "be extended so as to constitute authority to search a person not connected in any way with the place being searched, who merely happens to be on the premises, and who is not mentioned or described in the affidavit of probable cause upon which the warrant was issued" (193 P. at 80).

The Supreme Court of Appeals of West Virginia reached the same result in *State v. Massie,* 95 W.Va. 233, 120 S.E. 514 (1923). Defendant was searched in a pool room under a "warrant for the pool room and everybody that was in it," and a pistol was found on his person. Convicted of carrying a pistol without a license, defendant contended that the search of his person was unconstitutional. The Supreme Court of Appeals agreed, holding:

> "It must be remembered that defendant had no interest in the poolroom; and that he was not named in the warrant. Assuming that the warrant was properly issued, and authorized the officer to search the premises described, did it authorize the search or arrest of one not named therein. who had no interest in or connection with the place or the business conducted there? . . . The constitutional provision above quoted [state constitutional provision identical

> with the Fourth Amendment] says that the warrant shall particularly describe the person or thing to be seized. The thing to be seized is described in the warrant here, but no person is named. To so construe the statute under consideration and the warrant issued thereunder as authorizing the officer to whom it is directed to search persons not named therein or to seize articles not directed to be taken, would be to give it the effect of the general search warrants in England and the writs of assistance in this country which were the subject of much discussion and general condemnation in the latter half of the eighteenth century. Indeed, it is said that the Fourth Amendment to the Federal Constitution was the direct result of the use of such warrants and writs (Cooley's Const. Limitations, (7th Ed.) 424–430; 2 Story on the Constitution (5th Ed.), § 1902; 2 Watson on the Constitution, 1414; 34 Harvard Law Rev. 362; *Boyd v. United States* 116 U.S. 610; *People v. Marxhausen,* 204 Mich. 559 171 N. W. 557, 3 A.L.R. 1505 (120 S.E. at 515 [7])."

Observing that "[it] is held everywhere that a search warrant must as particularly as possible describe the place to be searched, and that no other place can be searched under such warrant [citation omitted]," the court declared that "*[t]he person of a citizen is as sacred as his property" (Id.).* (Emphasis added).

In *State v. Wuest,* 308 N.W. 899, 900 (Wisc. 1926), the Wisconsin Supreme Court noted that "there seems to be no dissent in the authorities from the proposition that a

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[7] The Michigan court's 1919 decision in *Marxhausen* contains a useful discussion of the history of the Fourth Amendment somewhat along the lines of that set out in part (A), *ante.*

search warrant, issued for the search of a place, does not confer authority for the search of a person, even though he be in charge of the place authorized to be searched." [8]

Finally, in one nineteenth century decision, the Supreme Court of Michigan condemned the arbitrary seizure of property belonging to a third party who was not suspected of crime by saying that, "The exercise of power no less arbitrary than this has caused revolutions" (*Newberry v. Carpenter,* (1895) 107 Mich. 567, 65 N.W. 530.

[8] *Accord: State v. Grames,* 68 Me 418, 421 (1878) ("It is one thing to find liquors in a place, and a very different thing to find them upon a person. A place to be searched is not a person to be searched"); but *see: Olympia v. Culp* (1925), 136 Wash. 374, 377; 240 P. 360 "officers may, under a warrant to search the premises, lawfully search any one found therein whom they have reasonable cause to believe has the articles for for which the search is instituted upon his person."

3. The Weight of Contemporary Authority Also Condemns the Arbitrary Search of Persons Merely Present in a Public Establishment

A clear majority of jurisdictions which have considered the question of whether police officers may search any and all persons they may encounter on the premises while executing a search warrant have held such broad search powers unconstitutional.[9]

[9] *United States v. Branch* (D.C. Cir. 1976) 545 F.2d 177, 181; *United States v. Micheli* (1st Cir. 1973) 487 F.2d 429, 431; *United States v. Haywood* (E.D.La. 1968) 284 F.Supp. 245, 250; *United States v. Festa* (D. Mass 1969) 192 F.Supp. 160, 163; *Smith v. State* (1974) 292 Ala. 120, 289 So.2d 816, 817–818; *People v. Tenney* (1972) 25 Cal.App.3d 16, 21–23, 101 Cal.Rptr. 419, *overruled on other grounds in People v. Leib* (1976) 16 Cal. 3d 869, 129 Cal.Rptr. 433, 548 P.2d 1105; *People v. Lujan* (1971) 174 Colo. 554, 484 P.2d 1238, 1242; *State v. Procce* (1969) 5 Conn.Cir. 637, 260 A.2d 413, 417–418; *State v. Wise* (Del.Super.Ct. 1971) 284 A.2d 292, 294; *Wilson v. State* (1975) 136 Ga.App. 70, 221 S.E.2d 62, 63; *State v. Cochran* (1975) 135 Ga.App. 47, 217 S.E.2d 181, 183–184; *State v. Nabarro (1974) 55 Haw. 583, 589, 525 P.2d 573, 576–577; McAllister v. State* (1974) 159 Ind.App. 340, 306 N.E.2d 395, 397; *State v. Burns* (Me. 1973) 306 A.2d 8, 10; *Sibriski v. State* (1973) 19 Md.App. 149, 310 A.2d 200, 201; *Commonwealth v. Smith* (Mass 1976) 348 N.E.2d 101, 103–107, cert. den. 429 U.S. 944; *State v. Fox* (1969) 283 Minn. 176, 168 N.W.2d 260; *State v. Bradbury* (1968) 109 N.H. 105, 243 A.2d 302, 303; *State v. Sims* (1978) 75 N.J. 337, 382 A.2d 638, 642–646; *State v. Helton* (1975) 146 N.J. 98, 369 A.2d 10, 11–12, *aff'd* 72 N.J. 169, (1977); *State v. Riggins* (Law. Div. 1976) 138 N.J. Super. 497, 351 A.2d 406; *People v. Nieves* (1975) 36 N.Y.2d 396, 369 N.Y.S.2d 50, 330 N.E.2d 26, 30–34; *Commonwealth v. Platou* (1973) 455 Pa. 258, 312 A.2d 29, *cert. den.* 417 U.S. 976; *Commonwealth v. Reece* (1970) 437 Pa. 422, 263 A.2d 463; *State v. Carufel* (1970) 106 R.I. 739, 263 A.2d 586, 641; *City of Tacoma v. Mundell* (1972) 6 Wash.App. 673, 495 P.2d 682, 684; *Contra: e.g., United States v. Graves* (D.C. App. 1974) 315 A.2d 559, 560–561; *Samuel v. State* (Fla. 1969) 222 So.2d 3, 5; *State v. Loudermilk* (1972) 208 Kan. 893, 494 P.2d 1174, 1176, 1178; *Brown v. State* (Tex.Cr.App. 1973) 498 S.W.2d 343, 346.

"The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' [Citation omitted]." (*Leland v. Oregon*, 343 U.S. 790, 798 (1952).[10]

Several state courts, particularly those of New York, New Jersey, and Massachusetts, have provided extensive discussions of the issue here under consideration.

In *People v. Nieves, supra,* 36 N.Y.2d 396, 369 N.Y.S.2d 50, 330 N.E.2d 26 (1975), the New York Court of Appeals had before it a state statute which provides: "A search warrant which directs a search of a designated or described place, premises or vehicle, may also direct a search of any person present thereat or therein." In upholding the statute, the court held that "[t]he circumstances under which a warrant may issue for the search of all occupants of a particular place are severely

[10] Commentators are also in agreement. See, e.g., Mascolo, *Specificity Requirements for Warrants under the Fourth Amendment: Defining the Zone of Privacy* (1968) 73 Dick.L.Rev. 1, 19–20; Comment, " *'The Search All Persons Power'—Does Presence Really Equal Probable Cause?'* (1973) 58 Cornell L.Rev. 614, 618–619. Discussing the Illinois statute here under consideration, Professor Wayne LaFave expresses serious doubts about its constitutionality in view of this court's decision in *United States v. Di Re;* LaFave, Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth" (1966), U.Ill.L.F. 255, 271–273. Professor LaFave suggests that a narrow reading of the statute to require some additional connection of the person to be searched to the premises beyond the mere status of guest may be necessary to render it constitutional. The court below, however, has refused to provide such a reading.

limited: the facts before the issuing judge at the time of the warrant application, and reasonable inferences from those facts, *must establish probable cause to believe that the premises are confined to ongoing illegal activity and that every person within the orbit of the search possesses 'the articles sought"* (330 N.E.2d at 34, emphasis added.)

The facts of the search conducted in *Nieves* present an even stronger case for upholding the police action than the facts of the case at bar. In *Nieves,* a New York police detective had obtained a search warrant to conduct a daytime search of one "El Parador Restaurant and Cocktail Lounge," the person of Elizar Vidal "and any other persons occupying said premises[,] and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered" for policy slips and various gambling paraphernalia (330 N.E.2d at 29). The warrant was based on a Detective Smith's affidavit that he had made over two hundred arrests for policy violations and that his application was based upon both personal knowledge and investigation and upon information supplied by a confidential reliable informant. Detective Smith stated that, while conducting a surveillance of the El Parador, he had observed various Puerto Rican male subjects approach Elizar Vidal, hold short conversations with him, and then pass money to him. Each subject left the area after giving slips of paper and money to Vidal, who, after each transaction, would enter the El Parador, stay inside a

short time, and then return to the outside of the restaurant. One of the subjects (not Nieves) was a known and convicted policy runner. While the surveillance was in progress, Detective Smith's informant walked into view and took a policy slip from his pants pocket. The informant approached Vidal, handed him the paper along with some money, and then left the area. Vidal went inside the restaurant, and Detective Smith left. Based on his observation and experiences, Smith concluded that Elizar Vidal was conducting a policy operation and was using the El Parador for keeping and storing policy records. Furthermore, the evidence sought was of a nature that could be easily and quickly destroyed (330 N.E.2d at 30).

Detective Smith testified at the suppression hearing that when he and other police officers were about to enter the El Parador to execute the search warrant, two men came out, apparently recognized the detective, dropped policy slips to the pavement and fled. The police then entered the El Parador, which was open, and saw Elizar Vidal seated at the bar next to another man (not Nieves). Nieves was seated alone at a table in the restaurant. Smith testified that these three were the only people present in the premises. There was no evidence that Nieves attempted to flee or resist or that the officer saw any policy slips or other evidence linking Nieves to the commission of a crime. The officer told all three men to empty their pockets. Policy contraband was recovered from Nieves' possession (*Id.*).

Nieves contended that the New York statute, as

written, was violative of the Fourth Amendment in that it authorized general searches. He also contended that the particular search of his person under the statute was unreasonable (*Id.* at 30). The court declined to strike down the statute but concluded that, as applied to Nieves, it commanded an improper general search.

In analyzing the issue of "whether mere presence at a specified place may be a sufficiently particular description of a person in a search warrant to meet the standards of the Fourth Amendment," the court stated that the sufficiency of the description in the case would "hinge in part on whether there was probable cause to believe that each and every occupant of the El Parador at any time of day possessed the policy slips and gambling records sought under the warrant [citation omitted].[11] The court concluded that the information before the issuing magistrate indicated, at best, probable cause to believe that Vidal, the named person in the warrant, might be engaged in a policy operation from the El Parador. There was, however, "no support for the inference that every occupant of the restaurant might be similarly engaged and hence in possession of the policy records sought in the warrant." 330 N.E.2d at 32–33. Neither the search warrant nor its supporting affidavit named the defendant or contained any physical description of him.

The court stated:

> "From the circumstances shown in the warrant application, it could as readily have been inferred that the unknown and unpredicted number of occupants at the El Parador might include innocent

> patrons having a meal or a drink, or service personnel delivering supplies for the daily operation of the restaurant and bar, all having no connection with the suspected criminal activity. Certainly there was no justification for an inference that each and every occupant in each and every area of the bar, the restaurant, the kitchen, the storage rooms and every other part of the premises was likely to possess policy records or be a party to illegal gambling in the premises. In short, there was not probable cause to believe that any person occupying the premises might be in possession of illegal gambling records at the time of the search. As a consequence, the description of defendant merely by reference to his presence at the premises was too general" (330 N.E.2d at 33).

By authorizing "a search of the entire premises at an apparently public place without any showing of probable cause that the premises were confined to illegal activity and that there was a substantial probability that all persons present at the time of execution would possess the items sought," the search warrant was too general as to the defendant, thereby affording no justification for the search (330 N.E.2d at 34).

The *Nieves* court noted that the public rather than private nature of the premises searched, while not determinative, was a significant factor to be considered in determining the reasonableness of the search (330 N.E.2d at 34). The court, expressing concern that innocent patrons of a public establishment would be swept up in dragnets, held that applications for search

warrants should state whether any person apparently unconnected with the illegal activity has been seen at the premises (*Id.*).

Finally, in upholding the New York statute, the court placed great importance in the role to be played by the issuing magistrate. The statute's potential problems of overbreadth and indefiniteness in authorizing the search of "any other person present" would be cured by limiting the discretion of the police:

> "An application for this type of warrant must be subjected to rigid scrutiny by the independent magistrate. . . The facts made known to the magistrate and the reasonable inferences to which they give rise, must create a substantial probability [citation omitted] that the authorized invasions of privacy will be justified by discovery of the items sought from all persons present when the warrant is executed. If this probability is not present, then each person subject to search must be identified in the warrant and supporting papers by name or sufficient personal description" (330 N.E.2d at 34).

Unlike the New York law, Illinois' broad search statute leaves to police on the scene virtually unlimited discretion as to which persons to search. No independent magistrate is obliged to subject to rigid scrutiny an application to search particular unidentified persons present as required by the New York law.

In *State v. Sims, Supra,* 75 N.J. 337, 382 A.2d 638 (1978), the New Jersey Supreme Court held that a warrant authorizing the search of service station premises and any person therein was an invalid general warrant

where the only evidence as to illegal gambling operations at the service station was a single intercepted telephone conversation during which two illegal bets were placed.

A unanimous court ruled that a search warrant providing for the search of unnamed persons which did not contain information sufficiently particular to distinguish its subject from the general public violates the Fourth Amendment. Following this court's reasoning in *United States v. Di Re,* the New Jersey court stated:

> "Defendants . . . were entering the office area of a service station. While such a place is admittedly not as open to general public invitation as, for instance, a restaurant or department store might be, mere presence at such premises is certainly less suggestive of participating in the owner's criminal activity than would be presence in an automobile" (382 A.2d at 644).

While the court did point to the fact that the search warrant affidavit contained no statement that numerous known gamblers had been observed entering the office over a period of time, it indicated in a footnote that even such an averment would not have supported the search in question.

The court noted:

> "However, even where there is police observation of known lawbreakers operating from a given location, a warrant permitting the search of all individuals therein is impermissible if that location is a truly public place . . . Although the service station in the instant case is not so likely to be frequented by

> members of the public as is a tavern, it surely possesses greater indicia of a public place than does a residential apartment" (382 A.2d at 645-646, n.3).

Sims cites with approval a New Jersey lower court decision, *State v. Riggins,* supra, 138 N.J.Super. 497, 351 A.2d 406 (Law Div. 1976), where a warrant authorizing the blanket search of anyone found in a tavern was declared void as a general warrant. The police in *Riggins* had obtained a warrant authorizing the search of a tavern and certain named persons, the bartender, barmaids and "all persons present" in the tavern to uncover evidence of an illegal lottery operation. While searching the tavern pursuant to the warrant, the police searched defendant who was in the tavern at the time of the raid. Defendant was not a tavern employee, nor was she mentioned by name or description in the search warrant affidavit. The search of defendant uncovered lottery paraphernalia, and she was arrested (351 A.2d at 407).

In granting defendant's motion to suppress evidence on the grounds that no probable cause existed to believe defendant was involved in criminal activity at the tavern, the court utilized the requirement of nexus between the individual to be searched and the ongoing criminal event. Such nexus was required to satisfy both the specificity requirement for warrants and to establish the requisite probable cause. The court commented:

> "In the present case the place to be searched was a public tavern, which caters to transient numbers of individuals from all segments of society. Taverns have traditionally served the societal interest in and

need for entertainment and community socializing. It is thus logical to assume that presence in a tavern would be for the legitimate purposes described. No rational suspicion leading to a probable cause belief that any person therein is involved in an illegitimate or criminal endeavor can be inferred from a patron's mere presence" (351 A2d at 408).

The court emphasized that the magistrate who authorized the "blanket search" was not presented with sufficient facts to equate one's mere presence at the tavern with criminal involvement:

> "The tavern, although arguably housing an illegal gambling operation, was also open to the public for legitimate purposes. Both patrons and alleged gamblers frequented the premises. It is quite possible that the illicit operations were covert in nature and went undetected by the tavern's various customers" (*Id*).

By authorizing the "blanket search of everyone present regardless of any prior determination of an individual's participation in the criminal activity," the warrant became a general warrant. "The evils of a general warrant could not be more pronounced" (351 A.2d at 409).

In *State v. Helton, supra,* 146 N.J.Super 98, 369 A.2d 10 (App.Div. 1975), *aff'd* 72 N.J. 169, a New Jersey court held that police officers who had a warrant authorizing a search of a tavern for narcotics and who observed the defendant making furtive movements with his hands in relation to his pockets did not have probable cause for his warrantless search.

The raiding party in *Helton* searched all ten persons

in the tavern. The officer testified that he ordered Helton to empty his pockets because, when approached, Helton appeared to be transferring objects from one pocket to another. The officer suspected an attempt to conceal narcotics. The search of Helton's person resulted in discovery of folded number slips. Noting that the police had no information whatsoever about Helton apart from his conduct as he was approached in the course of the search, the court held: "(1) there was no probable cause to believe defendant to be in possession of seizable objects on the occasion in question; (2) alternatively, if the circumstances were within the outer perimeter of probable cause, they were not strong enought to bypass the warrant requirement on any theory of threatened loss of evidence" (369 A.2d at 11–12). The New Jersey Supreme Court unanimously approved the decision of the Appellate Division "substantially for the reasons" expressed in the lower court's opinion (*State v. Helton, supra,* 72 N.J. 169, 369 A.2d 10 (Sup.Ct. 1977)).

The decisions of the New Jersey courts on this issue are particularly germane here in view of the Illinois Attorney General's reliance on Chief Justice Weintraub's opinion in *State v. De Simone,* 60 N.J. 319, 288 A.2d 849 (1972) (Appellee's Motion to Dismiss, p. 5). *De Simone* involved a warrant to search a specific automobile "and all persons found therein" for gambling paraphernalia. The automobile had been observed to be an instrument in a "floating lottery drop" operation. Defendant, a passenger in the automobile,

was searched; revealing lottery slips on his person.

De Simone is easily distinguishable on the grounds that the issuing magistrate in that case could have properly assumed that, from the very nature of the crime alleged and the instrumentalities involved, anyone present in the car was probably a party to the crime, and thus independently subject to arrest and incidental search. (cf. *United States v. Robinson* (1973) 414 U.S. 218.). This, of course, is exactly what the New Jersey court did when a search of patrons of a public establishment was attempted under color of *De Simone.*[11] (*State v. Sims, supra,* 75 N.J. 337, 382 A.2d 638.)

In *Commonwealth v. Smith, supra,* 348 N.E.2d 101 (Mass. 1976), the Supreme Court of Massachusetts upheld the search of all persons at an apartment pursuant to a search warrant. In so doing, however, the court made clear "that only in special circumstances such as those shown in the affidavit here will a search

[11] In *De Simone,* Chief Justice Weintraub supplied the following set of guidelines for determining what circumstance would furnish probable cause to believe that a person present at a particular location was a participant in the ongoing criminal activity:

> "On principle, the sufficiency of a warrant to search persons identified only by their presence at a specified place should depend upon the facts. A showing that lottery slips are sold in a department store or an industrial plant obviously would not justify a warrant to search every person on the premises, for there would be no probable cause to believe that everyone there was participating in the illegal operation. On the other hand, a showing that a dice game is operated in a manhole or in a barn should suffice, for the reason that the place is so limited and the illegal operation so overt that it is likely that everyone present is a party to the offense. Such a setting furnishes not only probable cause but also a designation of the persons to be searched which functionally is as precise as a dimensional portrait of them" (288 A.2d at 850).

warrant aimed principally at the premises also be held to include validly the search of any person present (348 N.E.2d at 103.) The court held that it was permissible to conclude from the particular facts of the case that "it was probable that any person in the apartment was a participant in the trafficking in heroin there" (348 N.E.2d at 106). Adopting the guidelines of the New York Court of Appeal in *Nieves, supra,* the court stressed (*inter alia*) as a particularly relevant factor in determining whether there is probable cause to believe that all persons present at the named premises are involved in the criminal activity afoot the "small, confined and private" nature of the premises "[a]s opposed to a public or quasi public place where casual presence of persons for a myriad of noncriminal reasons is to be expected" (348 N.E.2d at 107 and n.5).

Finally, the Illinois Appellate Court's opinion in the present case contains an erroneous interpretation of decisions of Georgia and Washington appellate courts. *Amicus* submits that, contrary to the Illinois Appellate Court's conclusion, the courts of both states have held that a specific warrant to search premises can *not* automatically be converted into a general one to search individuals (*State v. Cochran,* supra, 135 Ga. App 47, 217 S.E.2d 181, 183 (1975); *State v. Raum,* 172 Wash. 680, 21 P.2d 291 (1933); *City of Tacoma v. Mundell,* supra, 6 Wash.App. 673, 495 P.2d 682 (1972)).

The Illinois Appellate Court quotes with approval, 373 N.E.2d at 1015, the following language from the Supreme Court of Washington in *Olympia v. Culp,* 136

Wash. 374, 377, 240 P.360, 361–367 (1925):

> "Officers making a search of premises under a search warrant may lawfully detain all persons found therein until the search is concluded.
>
> Any other rule would frustrate the purposes of the search; the officers would be compelled to stand idly by while the articles for which the search was instituted were carried away. The law is not so impotent as this. The officers may, under a warrant to search the premises lawfully search any one found therein *whom they have reasonable cause to believe has the articles for which the search is instituted upon his person*" (emphasis added).[12]

Thus, in *City of Tacoma v. Mundell, supra,* 6 Wash.App.673, 495 P.2d 682, 685 (1972), the Washington Court of Appeal specifically held that "[a] specific warrant to search a premises cannot be converted into a general one to search individuals" (*see* also *State v. Raum,* supra, 172 Wash. 680, 21 P.2d 291 (1933)).

The Illinois opinion also cites *Willis v. State,* 122 Ga.App. 455, 177 S.E.2d 487 (1970) as agreeing with its position (373 N.E.2d at 1015). *Willis* involved a Georgia statute, Ga. Stat. Ann. Sec. 27-309, identical to the Illinois statute. The Illinois court notes in its opinion:

> "Defendant argues the Georgia courts do not allow the persons of those present to be searched, pursuant to a warrant for the premises, but that other facts and circumstances making it likely that the items are

[12] We believe that *Culp* is incorrect, however, to the extent it fails to insist that such probable cause be set out in the application for the warrant. Cf. *State v. Helton, supra,* 146 N.J. Super. 98, 369 A. 2d 10, *aff'd* 72 N.J. 169.

> being concealed by them must be present to justify the search of their persons . . . We find *Willis* is actually supportive of the search of the defendant therein" (*Id.*).

Despite this assertion, in *State v. Cochran, supra,* 135 Ga.App. 47, 217 S.E.2d 181, 183, the Georgia Court of Appeals interpreted *Willis* to hold "that a warrant to search designated premises will *not* authorize the search of every individual who happens to be on the premises" (emphasis added). In *Cochran* the court struck down the search of persons attempting to leave the Sunshine Club. The police stopped the car in which defendant was riding pursuant to a warrant authorizing the search for narcotics of automobiles, persons, and two buildings on the premises known as the Sunshine Club. Holding this to have been a general warrant, the court observed that the Sunshine Club was "a commercial establishment, not a private apartment" (217 S.E.2d at 183). Noting that the club was accessible to the entire public, the court stated that the "indiscriminate sweep of the language employed in this warrant is constitutionally intolerable" (217 S.E.2d at 184; see also *Wilson v. State, supra,* 136 Ga.App. 70, 221 S.E.2d 62, 63 (warrant purporting to authorize search of commercial bar "and all persons on the premises" held invalid general warrant as to customer seated at the bar when warrant executed)).

CONCLUSION

Whether one approaches the facts of this case from the standpoint of pre-constitutional English history, state common law, or contemporary federal constitutional law, one is led to the same conclusion: The bounds of reasonableness, within which officers of the government of any free society must confine themselves, have been transgressed by the arbitrary search of Ventura Ybarra.

For this reason, the judgment of the Illinois appellate court should be reversed.

Respectfully submitted,
QUIN DENVIR
State Public Defender of California

LAURANCE S. SMITH
RICHARD S. KESSLER
SUSAN L. BURRELL
Deputies State Public Defender

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